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No. 97-634

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# In the Supreme Court

OF THE

## United States

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OCTOBER TERM, 1997

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF CORRECTIONS, et al.,  
*Petitioners,*

v.

RONALD R. YESKEY,  
*Respondent.*

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On A Writ Of Certiorari To The  
United States Court Of Appeals For The Third Circuit

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### BRIEF FOR THE RESPONDENT

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**QUESTION PRESENTED**

Whether Congress intended the Americans with Disabilities Act, which prohibits any and all state agencies from discriminating against disabled individuals, to apply to state prisoners?

## TABLE OF CONTENTS

	Page
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. INTRODUCTION	6
II. TITLE II OF THE ADA PROTECTS STATE PRISONERS FROM DISCRIMINATION ON THE BASIS OF DISABILITY.	10
A. Title II Of The ADA Unambiguously Covers State Prisoners.	10
B. The Clear Statement Rule Should Not Be Applied To Determine Whether The ADA Protects State Prisoners.	19
C. Under Normal Rules Of Statutory Construction, The ADA Should Be Applied To State Prisoners.	23
1. The ADA Incorporates Section 504 Regulations That Have Consistently Applied To Prisons.	23

	Page
2. The Legislative History Supports Application Of The ADA To Prisons.	25
3. Department Of Justice Regulations Applying The ADA To Prisoners Are Entitled To Great Deference.	28
4. A Judicially Created Exemption To The ADA For State Prisoners Is Not Warranted.	29
III. THIS COURT SHOULD NOT REACH THE CONSTITUTIONAL ISSUES.	32
IV. PETITIONERS' CONSTITUTIONAL ARGUMENTS HAVE NO MERIT.	33
A. Petitioners' "As Applied" Challenge To The Statute Is Too Broad.	33
B. Congress Properly Exercised Its Powers Under Section 5 Of The 14th Amendment.	34
1. Congress Has Broad Powers To Enact Remedial And Preventative Legislation To Enforce The Equal Protection Clause In State Prisons.	35
2. As Applied To State Prisoners The ADA Is A Constitutional Exercise Of Congress's Remedial Powers.	36

iv	Page
a. Applying The ADA To Prisoners Is Consistent With The Court's Interpretation Of The Equal Protection Clause. 38	
b. The Legislative Record Is Sufficient To Support The ADA's Application To State Prisoners. 41	
c. The ADA Does Not Impose A Constitutionally Excessive Burden On Prison Officials. 43	
C. Congress May Regulate Discrimination In Prison Under The Commerce Clause. 46	
CONCLUSION 48	

## TABLE OF AUTHORITIES

Page

**Cases**

<i>Albright v. Oliver</i> , 510 U.S. 266, 127 L. Ed. 2d 114 (1994)	2
<i>Amos v. Maryland Dep't of Public Safety &amp; Correctional Servs.</i> , 126 F.3d 589 (4th Cir. 1997), petition for cert. filed, 66 U.S.L.W. 3474 (U.S. Dec. 19, 1997) (No. 97-1113)	11, 12, 13, 15, 17
<i>Andrus v. Glover Constr. Co.</i> , 446 U.S. 608 (1980)	15
<i>Armstrong v. Wilson</i> , 124 F.3d 1019 (9th Cir. 1997), petition for cert. filed, 66 U.S.L.W. 3308 (U.S. Oct. 20, 1997)	18
<i>Bailey v. United States</i> , 516 U.S. 137, 133 L. Ed. 2d 472 (1995)	11
<i>Bonner v. Lewis</i> , 857 F.2d 559 (9th Cir. 1988)	27
<i>Bray v. Alexandria Women's Health Clinic</i> , 506 U.S. 263 (1993)	14
<i>Bryant v. Madigan</i> , 84 F.3d 246 (1996)	18
<i>Burson v. Freeman</i> , 504 U.S. 191 (1992)	34
<i>Cannon v. University of Chicago</i> , 441 U.S. 677 (1979)	27
<i>Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984)	28

vi	Page	vii	Page
<i>City of Boerne v. Flores</i> , --U.S.--, 138 L. Ed. 2d 624 (1997)	35, 36, 37, 39, 42, 43	<i>Dellmuth v. Muth</i> , 491 U.S. 223 (1989)	17
<i>City of Cleburne v. Cleburne Living Center</i> , 473 U.S. 432 (1985)	37, 38, 39, 40, 41, 43	<i>Dothard v. Rawlinson</i> , 433 U.S. 321 (1977)	22
<i>City of Edmonds v. Oxford House, Inc.</i> , 514 U.S. 725, 131 L. Ed. 2d 801 (1995)	20	<i>Duffy v. Riveland</i> , 98 F.3d 447 (9th Cir. 1996)	18
<i>City of Rome v. United States</i> , 446 U.S. 156 (1980)	39, 40, 42, 44	<i>EEOC v. Massachusetts</i> , 987 F.2d 64 (1st Cir. 1993)	20
<i>Clark v. California</i> , 123 F.3d 1267 (9th Cir. 1997), petition for cert. filed, 66 U.S.L.W. 3308 (U.S. Oct. 20, 1997)	33, 40	<i>Employment Division, Dep't of Human Resources v. Smith</i> , 494 U.S. 972 (1990)	37, 44
<i>Clarkson v. Coughlin</i> , 898 F. Supp. 1019 (S.D.N.Y. 1995)	18	<i>Estelle v. Gamble</i> , 429 U.S. 97 (1976)	44
<i>Conley v. Gibson</i> , 355 U.S. 41 (1957)	34	<i>Ex parte Virginia</i> , 100 U.S. 339 (1880)	35
<i>Connecticut Nat'l Bank v. Germain</i> , 503 U.S. 249 (1992)	10	<i>FCC v. National Citizens Comm. for Broadcasting</i> , 436 U.S. 775 (1978)	42
<i>Consolidated Rail Corp. v. Darrone</i> , 465 U.S. 624 (1984)	23, 25, 26	<i>Fitzpatrick v. Bitzer</i> , 427 U.S. 445 (1976)	35, 47
<i>Coolbaugh v. Louisiana</i> , -- F.3d --, No. 96-30664, 1998 WL 84123 (5th Cir. Feb. 27, 1998)	7, 33, 41	<i>Fullilove v. Klutznick</i> , 448 U.S. 448 (1990)	36, 39
<i>Crawford v. Indiana Dep't of Correction</i> , 937 F. Supp. 785 (N.D. Ind. 1996), rev'd, 115 F.3d 481 (7th Cir. 1997)	18	<i>Garcia v. San Antonio Metropolitan Transit Auth.</i> , 469 U.S. 528 (1985)	20, 21
<i>Crawford v. Indiana Dep't of Corrections</i> , 115 F.3d 481 (7th Cir. 1997)	18, 19, 33, 45, 46	<i>Gately v. Massachusetts</i> , 2 F.3d 1221 (1st Cir. 1993)	20
<i>Dean v. Knowles</i> , 912 F. Supp. 519 (S.D. Fla. 1996)	18	<i>Green v. Bock Laundry Mach. Co.</i> , 490 U.S. 504 (1989)	29
		<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991)	4, 5, 15, 16, 17, 19, 20, 21, 22
		<i>Grove City College v. Bell</i> , 465 U.S. 555 (1984)	26
		<i>Herndon v. Johnson</i> , 970 F. Supp. 703 (E.D. Ark. 1997)	18
		<i>Hilton v. South Carolina Pub. Rys. Comm'n</i> , 502 U.S. 197 (1991)	19

viii	Page	ix	Page
<i>Hodel v. Virginia Surface Mining &amp; Reclamation Ass'n</i> , 452 U.S. 264 (1981)	48	<i>Public Citizen v. United States Dep't of Justice</i> , 491 U.S. 440 (1989)	16, 29
<i>Journey v. Vitek</i> , 685 F.2d 239 (8th Cir. 1982)	27	<i>Purcell v. Pennsylvania Dep't of Corrections</i> , No. 95-6720, 1998 U.S. Dist. LEXIS 105 (E.D. Pa. Jan. 9, 1998)	31
<i>Katzenbach v. Morgan</i> , 384 U.S. 641 (1966)	39, 40, 42, 44	<i>Randolph v. Rodgers</i> , 980 F. Supp. 1051 (E.D. Mo. 1997)	18
<i>Kaufman v. Carter</i> , 952 F. Supp. 520 (W.D. Mich. 1996)	18	<i>Reich v. New York</i> , 3 F.3d 581 (2d Cir. 1993)	20
<i>Kendrick v. Bland</i> , 541 F. Supp. 21 (W.D. Ky. 1981)	27	<i>Renne v. Geary</i> , 501 U.S. 312 (1991)	33
<i>Key v. Grayson</i> , No. Civ.A. 96-40166, 1988 WL 125769 (E.D. Mich. Mar. 19, 1998)	18	<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947)	21
<i>King v. Edgar</i> , No. 96 C 4137, 1996 U.S. Dist. LEXIS 17999 (N.D. Ill. Dec. 9, 1996)	18	<i>Richardson v. McKnight</i> , -U.S.-, 138 L. Ed. 2d 540 (1997)	14, 22
<i>Lee v. Washington</i> , 390 U.S. 333 (1968)	38	<i>Rust v. Sullivan</i> , 500 U.S. 173 (1991)	28, 34
<i>Lewis v. Casey</i> , 518 U.S. 343, 135 L. Ed. 2d 606 (1996)	32	<i>Salinas v. United States</i> , -U.S.-, 139 L. Ed. 2d 352 (1997)	19, 20
<i>Love v. Westville Correctional Ctr.</i> , 103 F.3d 558 (7th Cir. 1996)	18	<i>School Board v. Arline</i> , 480 U.S. 273 (1987)	9, 30
<i>Miller v. Illinois Dep't of Corrections</i> , 107 F.3d 483 (7th Cir. 1997)	22	<i>Sites v. McKenzie</i> , 423 F. Supp. 1190 (N.D. W. Va. 1976)	27
<i>National League of Cities v. Usery</i> , 426 U.S. 833 (1976)	22	<i>South Carolina v. Katzenbach</i> , 383 U.S. 301 (1966)	39, 44
<i>New York v. United States</i> , 505 U.S. 144 (1991)	47	<i>Southeastern Community College v. Davis</i> , 442 U.S. 397 (1979)	8
<i>Niece v. Fitzner</i> , 941 F. Supp. 1497 (E.D. Mich. 1996)	18	<i>Taylor v. Freeland &amp; Kronz</i> , 503 U.S. 638 (1992)	33
<i>Oregon v. Mitchell</i> , 400 U.S. 112 (1970)	41, 42, 44	<i>Torcasio v. Murray</i> , 57 F.3d 1340 (4th Cir. 1995)	17, 18
<i>Printz v. United States</i> , -U.S.-, 138 L. Ed. 2d 914 (1997)	47	<i>Traynor v. Turnage</i> , 485 U.S. 535 (1988)	25
		<i>Turner Broadcasting Sys. v. FCC</i> , 520 U.S.-, 137 L. Ed. 2d 369 (1997)	42

x	Page	xi	Page
<i>Turner v. Safley</i> , 482 U.S. 78 (1987)	21, 30, 38, 40, 44	<b>Statutes and Regulations</b>	
<i>United States v. Bass</i> , 404 U.S. 336 (1971)	21	<b>20 U.S.C. §1681</b>	26
<i>United States v. Board of Comm'rs</i> , 435 U.S. 110 (1978)	25	<b>29 U.S.C.</b>	24
		<i>§790 et seq.</i>	<i>passim</i>
<i>United States v. Locke</i> , 471 U.S. 84 (1985)	29	<i>§794</i>	11
<i>United States v. Lopez</i> , 514 U.S.—, 131 L. Ed. 2d 626 (1995)	46, 47	<i>§794(b)(1)</i>	
<i>United States v. Lot 5, Fox Grove</i> , 23 F.3d 359 (11th Cir. 1994)	20	<b>42 U.S.C.</b>	
<i>United States v. Monsanto</i> , 491 U.S. 600 (1989)	17	<i>§2000bb(a)</i>	37
<i>United States v. Salerno</i> , 481 U.S. 739 (1987)	34	<i>§2000bb(b)</i>	37
<i>Yee v. City of Escondido</i> , 503 U.S. 519 (1992)	33	<i>§2000bb-1</i>	37
<i>Yeskey v. Pennsylvania Dep't of Corrections</i> , 118 F.3d 168 (3d Cir. 1997), <i>petition for cert.</i> <i>granted</i> , 118 S. Ct. 876 (Jan. 23, 1998) (No. 97-634)	3, 11, 12, 13, 45	<i>§12101(a)</i>	7, 14, 38, 43, 47
		<i>§12101(b)</i>	6, 8, 38, 47
		<i>§12111(5)(B)</i>	15
		<i>§12131 et seq.</i>	3
		<i>§12131(1)</i>	4, 10
		<i>§12131(2)</i>	12
		<i>§12132</i>	11, 12, 38
		<i>§12133</i>	11
		<i>§12134</i>	11
		<i>§12134(a)</i>	28
		<i>§12134(b)</i>	8, 23, 24
		<i>§12201(a)</i>	8, 11, 24
		<i>§12202</i>	10
		<i>§12208</i>	15
		<i>§12210(a)</i>	15
<b>Constitutional Provisions</b>		<b>Civil Rights Restoration Act, Pub. L. No. 100-259</b>	
<b>U.S. CONST.</b>			<b>25</b>
art. I, §1	19	<b>FED. R. CIV. P. 12(b)(6)</b>	2, 3
art. IV, §3	21	<b>FED. R. EVID. 201(b)(2)</b>	3
art. IV, §4	21	<b>28 C.F.R.</b>	
amend. XIV, §5	6, 34, 35, 38, 39, 40, 47	<i>§35.104</i>	9
amend. XV, §2	39	<i>§35.130(b)(7)</i>	8
		<i>§35.150(a)</i>	8, 9
		<i>§35.150(b)(1)</i>	9, 29
		<i>§35.151(c)</i>	29

xii	Page	xiii	Page
§35.190	28	PA. STAT. ANN. tit. 61 (West Supp. 1997)	
§35.190(b)(6)	28	§1122	14
pt. 35, App. A	8, 9, 28	§1123	2, 12, 13, 46
§36.104	9	§1124	13
pt. 39	22, 24	§1125(b)	15, 45
§39.150	24		
§39.170(d)	24		
pt. 39, Editorial Note	24, 25	<b>Legislative Materials</b>	
pt. 41	23		
§41.4(c)	23	<i>Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Relations, 101st Cong. (1989)</i>	27
pt. 42	23		
§42.540(h)	24	<i>Americans with Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Subcomm. on the Handicapped of the Comm. on Labor and Human Relations, 100th Cong. (1988)</i>	27
§42.540(j)	24		
§42.522(b)	24		
§345.10	10	<i>Rehabilitation of the Handicapped Programs, 1976: Hearings Before the Subcomm. on the Handicapped of the Comm. on Labor and Public Welfare, 94th Cong. (1976)</i>	25
36 C.F.R. pt. 1191	29		
41 C.F.R.			
subpt. 101-19.6, App. A	24	<i>H.R. REP. NO. 485(III) (1990), reprinted in 1990 U.S.C.C.A.N. 445</i>	8, 9, 25, 27
subpt. 101-19.6, App. A §4.1.4(9)(c)	24, 29		
45 Fed. Reg.			
37,621	24	<i>H.R. REP. NO. 101-485(II) (1990), reprinted in 1990 U.S.C.C.A.N. 303</i>	7, 8, 23, 26
37,627	24		
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31,676	9	<i>S. REP. NO. 101-116 (1989)</i>	7, 9, 26
31,681	9		
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63 Fed. Reg.			
2000	9, 29		
2046-47	9, 29		

**Other Authorities**

	Page
HARRY ELMER BARNES, <i>THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA</i> (1927)	15
COMMONWEALTH OF PENNSYLVANIA, DEP'T OF CORRECTIONS, QUEHANNA BOOT CAMP INMATE HANDBOOK	3
D.O. Conkle, <i>The Religious Freedom Restoration Act: The Constitutional Significance Of An Unconstitutional Statute</i> , 56 MONT. L. REV. 39 (1995)	37
CORRECTIONAL INDUSTRIES ASS'N, 1997 DIRECTORY: PRODUCING PRODUCTIVE PEOPLE (1997)	46
T. Don Hutto, <i>The Privatization of Prisons</i> , in ARE PRISONS ANY BETTER? (J. Murphy & J. Dison eds., 1990)	22
PENN. DEP'T OF EDUC. FINAL REPORT: A PROGRAM TO REINTEGRATE PENNSYLVANIA INMATES THROUGH LIVE WORK AND COMMUNITY INVOLVEMENT (June 30, 1996)	31
WILLIAM G. SAYLOR & GERALD G. GAES, U.S. FED. BUREAU OF PRISONS INTERIM REPORT: THE EFFECT OF PRISON WORK EXPERIENCE, VOCATIONAL AND APPRENTICESHIP TRAINING ON THE LONG-TERM RECIDIVISM OF U.S. FEDERAL PRISONS (Nov. 1995)	31
WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1966)	43

**CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED**

In addition to the constitutional, statutory, and regulatory provisions set out in the Brief for Petitioners, the following statutory and regulatory provisions are also involved, and are set forth verbatim in the appendix to this brief.

Portions of the Americans with Disabilities Act, specifically 42 U.S.C. §§12111, 12201, 12202, 12208, and 12210, are set forth verbatim in the appendix at A1-A4.

The Department of Justice regulations implementing the ADA are set forth at Part 35 of Title 28 of the Code of Federal Regulations. 28 C.F.R. §§35.104, 35.149, 35.151, 35.164, 35.190, and excerpts from Appendix A are set forth verbatim in the appendix at A5-A11.

The Department of Justice regulations implementing Section 504 of the Rehabilitation Act of 1973 with respect to Activities Conducted By The Department of Justice are set forth at Part 39 of Title 28 of the Code of Federal Regulations. 28 C.F.R. §§39.150, 39.170, and excerpts from the Editorial Note are set forth verbatim in the appendix at A11-A16.

The Department of Justice coordination regulations implementing Section 504 of the Rehabilitation Act of 1973 with respect to Federally Assisted Programs are set forth at Part 41 of Title 28 of the Code of Federal Regulations. 28 C.F.R. §41.4 is set forth verbatim in the appendix at A16-A17.

The Department of Justice regulations implementing Section 504 of the Rehabilitation Act of 1973 with respect to Federally Assisted Programs are set forth at Part 42 of Title 28 of the Code of Federal Regulations. 28 C.F.R. §§42.522 and 42.540 are set forth verbatim in the appendix at A17-A18. The Department of Justice analysis of these regulations is set forth at Volume 45, No. 108 of the Federal

Register. Excerpts from the Federal Register are set forth verbatim in the appendix at A24-A27.

The Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities; State and Local Government Facilities, are set forth at Part 1191 of Title 36 of the Code of Federal Regulations, published at 63 Fed. Reg. 2000 (Jan. 13, 1998). Section 12, Detention and Correctional Facilities, is set forth verbatim in the appendix at A19-A23.

The Uniform Federal Accessibility Standards are set forth at Appendix A to subpart 101-19.6 of Title 41 of the Code of Federal Regulations. An excerpt from Section 4.1.4 is set forth verbatim in the appendix at A23-A24.

#### STATEMENT OF THE CASE

Respondent Ronald R. Yeskey was originally sentenced to serve eighteen to thirty-six months in state prison, but the sentencing court recommended that Yeskey instead be placed in the Motivational Boot Camp Program ("Boot Camp") for youthful, non-violent offenders. JA 6 (Complaint) ¶¶9-10.<sup>1</sup> Participants in the Boot Camp are released on parole after just six months and receive the benefits of substance abuse treatment, continuing education, vocational training, work experience on public projects, and pre-release counseling. *Id.* ¶10; PA. STAT. ANN. tit. 61, §1123 (West Supp. 1997).

Despite the sentencing court's recommendation, Petitioner Department of Corrections refused to let Yeskey participate in the program "due to a medical history of hypertension (on medication)." JA 6 ¶11. Petitioners refused to reconsider this decision, and Yeskey therefore spent over a year longer in prison and was denied the

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<sup>1</sup>Because Yeskey's case was dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6), all well-pleaded allegations of the complaint must be taken as true for purposes of this appeal. *See Albright v. Oliver*, 510 U.S. 266, 268, 127 L. Ed. 2d 114, 120 (1994) (plurality opinion).

benefits of the boot camp program because of his disability. *Id.* ¶¶10, 12, 17.

Yeskey brought this suit under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12131 *et seq.*, seeking both money damages and injunctive relief.<sup>2</sup> JA 10-11 ¶c. Petitioners moved to dismiss under Rule 12(b)(6), arguing that (1) Yeskey had no protected right to a particular custody status, (2) he was not an "otherwise qualified individual" because he could not meet the Boot Camp's requirement of "rigorous physical activity"<sup>3</sup> and (3) the ADA did not apply to prison inmates. The District Court held that the ADA does not apply to state prison inmates and dismissed the entire action. JA 95. No constitutional issue was raised or decided.

The Third Circuit reversed. Based on the "plain words of [the] statute," as well as the "weight of judicial authority" and the Department of Justice ("DOJ") regulations implementing the statute, the Court held that the ADA applies to state prison inmates. *Yeskey v. Pennsylvania Dep't of*

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<sup>2</sup>Although Yeskey has been released from prison, his request for an injunction is not moot, because this is a wrong capable of repetition yet evading review. *See Yeskey v. Pennsylvania Dep't of Corrections*, 118 F.3d 168, 170 n.3 (3d Cir. 1997), petition for cert. granted, 118 S. Ct. 876 (Jan. 23, 1998) (No. 97-634).

<sup>3</sup>This Court must assume that Yeskey is "qualified," because he has alleged as much. JA 7 ¶14. On remand, Yeskey will be entitled to prove, on summary judgment or at trial, either that (1) he is capable of performing "vigorous physical activity" without risk to his health and therefore needs no accommodation or change in policy to permit his participation; or (2) that Petitioner could make some reasonable change to its policies, which only require one hour of calisthenics at the beginning of a full day of work, educational and vocational training and substance abuse treatment. *See* excerpt from COMMONWEALTH OF PENNSYLVANIA, DEPT. OF CORRECTIONS, QUEHANNA BOOT CAMP INMATE HANDBOOK, reprinted in Appendix at A29-A33. (This Court may take judicial notice of the existence of the handbook. FED. R. EVID. 201(b)(2).) Petitioner may then articulate some legitimate non-discriminatory reason for excluding Yeskey, or demonstrate that any proposed modification of its policies would alter the purpose of the boot camp program.

*Corrections*, 118 F.3d 168, 170-74 (3d Cir. 1997), *petition for cert. granted*, 118 S. Ct. 876 (Jan. 23, 1998) (No. 97-634). Again, no constitutional issue was raised or decided.

#### SUMMARY OF ARGUMENT

Congress found and Petitioners concede that discrimination against people with disabilities pervades nearly every aspect of our society. Completely absent from Petitioners' argument is any suggestion that this noxious form of discrimination does not infect state prisons. Although Petitioners agree that the ADA represents an appropriate exercise of congressional authority to eliminate discrimination for the rest of society, they contend that the ADA should never be applied to any prisoner who has suffered discrimination on the basis of disability, under any circumstance, in any state prison. That is not the law. There is no "state prisoner exception" to the ADA, and the Court should not create one.

The plain words of the ADA provide universal protection against discrimination to *all* individuals with disabilities who participate in programs of "any State or local government" or "any department, agency . . . or other instrumentality of a State . . ." 42 U.S.C. §12131(1) (emphasis added). Congress confirmed that prisoners are covered by incorporating into the ADA federal regulations implementing Section 504 of the Rehabilitation Act, which explicitly cover prisoners. The legislative history of the ADA and other relevant statutes also shows that discrimination against prisoners was one of the specific problems Congress considered before it enacted the statute.

Petitioners cannot avoid the unambiguous terms of the ADA; instead, they distort the clear statement rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991). Petitioners' implicit claim that *Gregory* requires that traditional state functions be enumerated in the text of the statute proves too much. There is no principled way to distinguish between managing prisoners and the myriad other state functions that are both traditional and essential, which Petitioners

concede are covered under the ADA. Under Petitioners' argument, the ADA would not apply to any traditional state function unless that function was specifically mentioned, which would result in excluding not only prisoners, but prison employees and visitors, police officers, school children, victims of crime, judges, institutionalized persons and countless others with disabilities.

This absurd result is not necessary. Petitioners' argument misconstrues the clear statement rule. First, *Gregory* held that Congress need not list every sovereign state function, but need only make its intention "clear." Second, the Court required a clear statement only when Congress intended to regulate state functions going to the heart of state sovereignty; it did not require a clear statement when Congress intended to regulate functions, like managing prisons and schools, traditionally performed by the states.

Petitioners really are making a policy argument: that the ADA might interfere with their discretion to maintain security. Not only is their argument only cognizable by Congress, but it is not supported by the facts, which are nothing more than imagined scenarios that are not before this or any other Court.

In fact, applying the ADA to state prisoners will not interfere with the management of state prisons. Petitioners concede that the ADA applies to prison employees and visitors. Section 504 of the Rehabilitation Act has been applied to state prisoners by federal regulation and court decisions for almost two decades. Congress imported the same regulatory standards into the ADA, thereby providing sufficient flexibility to operate prisons, and any other state program, safely and with due concern for legitimate security interests. Specifically, the ADA does not require prison officials to modify programs if doing so will create a significant risk of harm to others, impose an undue financial or administrative burden, or fundamentally alter the nature of the states' programs.

Petitioners' constitutional arguments were neither made nor decided below, and the Court should not (and need not) address them. They are also without merit. First, the Court has held that prisoners retain their right to be free of discrimination. The ADA is as congruent with the Fourteenth Amendment within prison as Petitioners concede it is outside the prison walls. Because its remedies are designed to accommodate the interests of the states according to the particular factual setting, the ADA also is as proportional a remedy to prevent future discrimination in prison as Petitioners concede it is in the free world. The ADA therefore is an appropriate exercise of Congress's remedial powers to prevent future unconstitutional discrimination under Section 5 of the Fourteenth Amendment. Second, Petitioners' other concession—that certain aspects of prisons substantially affect interstate commerce—is fatal to their Commerce Clause argument since Congress may ban discrimination in prison as part of its regulation of a larger class of activities. Finally, since the ADA does not "commandeer" state officials and press them into federal service, the statute does no harm to the principles of federalism.

The central purpose of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. §12101(b)(1). The ADA does nothing more than permit prisoners with disabilities access to the same programs, services and activities as non-disabled prisoners. This unremarkable result was intended by Congress and is sanctioned by the Constitution.

## ARGUMENT

### I.

#### INTRODUCTION

Congress enacted the ADA after twenty years of experience with six other disability discrimination statutes demonstrated that a comprehensive remedy was necessary.

See H.R. REP. NO. 101-485(II), at 48 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 330; S. REP. NO. 101-116, at 19. Congress based the ADA on two years of work and on a vast amount of information from numerous sources, including fourteen congressional hearings, polling data on society's attitudes toward the disabled, a report from the U.S. Commission on Civil Rights, and seven other substantive studies or reports, one of which compiled the testimony from seventy-seven public hearings in all fifty states and the District of Columbia. See *Coolbaugh v. Louisiana*, -F.3d-, No. 96-30664, 1998 WL 84123, at \*6-\*8 (5th Cir. Feb. 27, 1998) (listing hearings and studies).<sup>4</sup> These studies and testimony specifically addressed disability discrimination against prisoners. See Part II(C)(2), *infra*.

Congress also made detailed findings about the pervasiveness of disability discrimination throughout American society. 42 U.S.C. §12101(a). Congress found that persons with disabilities have been subjected to a history of unequal treatment, that such discrimination persists in critical areas of society, including institutionalization and access to public services and that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." *Id.*

These amply supported findings demanded a direct and thorough federal response, forbidding disability discrimination in all aspects of society, including employment decisions, government services, public transportation, telecommunications, and public accommodations. Congress

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<sup>4</sup>See also Brief of Amici Curiae the National Advisory Group for Justice, et al., which contains an extensive discussion of the legislative history of the ADA and its precursor statutes.

enacted the ADA to establish a “clear and *comprehensive* national mandate for the elimination of discrimination against individuals with disabilities” and to “provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.” 42 U.S.C. §12101(b) (emphasis added).

Congress specifically concluded that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, which prohibits disability discrimination by public agencies that receive federal funds, was insufficient. It enacted Title II of the ADA to expand the scope of coverage of the Rehabilitation Act and its implementing regulations and specifically incorporated the Rehabilitation Act standards and regulations into Title II to assure that all operations of state and local governments would be accessible to persons with disabilities in a non-discriminatory manner. *See* 42 U.S.C. §§12201(a), 12134(b); H.R. REP. NO. 101-485(II), at 47-48, 184 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 329-30, 366; H.R. REP. NO. 101-485(III), at 69 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 492. These Rehabilitation Act regulations have always applied to state prisoners. *See* Part II(C)(1), *infra*.

The ADA’s broad non-discrimination mandate requires guidelines that apply in a wide variety of factual circumstances, with due respect for state interests and policy choices. For that reason, the ADA’s implementing regulations, modeled after Rehabilitation Act regulations and this Court’s interpretations of them, are broad and flexible to balance the needs of people with disabilities and the legitimate interests of local and state governments.

Thus, the regulations require only *reasonable* modifications that neither “*result in a fundamental alteration*” of a program nor create an “*undue financial or administrative burden*.” 28 C.F.R. §35.150(a)(3) (emphasis added); *see also* id. §35.130(b)(7); *id.* pt. 35, App. A at 477, 483 (regulations codify holding in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979)). Nor do the regulations require a public agency to take any action that poses a significant risk

to the health or safety of others. 28 C.F.R. §35.104; *id.* pt. 35, App. A at 472 (DOJ Analysis of §35.104; codifying *School Board v. Arline*, 480 U.S. 273, 287 (1987))<sup>5</sup>; *see also* 28 C.F.R. §36.104.<sup>6</sup> Indeed, recognizing the special challenges posed by architectural access in prisons, the ADA Accessibility Guidelines (“ADAAG”) contain several prison-specific exceptions, most promulgated in response to comments from *prison administrators*.<sup>7</sup>

The ADA is a flexible statute that respects legitimate penological and security concerns. Moreover, the requirements of Title II have been applied in this manner to state prisoners for almost two decades under Section 504. *See infra*, Parts II(C)(1)-(2).

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<sup>5</sup>*See* H.R. REP. NO. 101-485(III), at 34 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 457; S. REP. NO. 101-116, at 27, 40.

<sup>6</sup>Moreover, a public entity is not required to make any structural changes in existing facilities where other methods effectively permit individuals with disabilities access to a public program, when the program is “viewed in its entirety.” 28 C.F.R. §35.150(a), (b)(1); *id.* pt. 35, App. A at 484 (structural changes in existing facilities not required unless no other “feasible way to make . . . program accessible”).

<sup>7</sup>*See, e.g.*, 63 Fed. Reg. 2046-47 (ADAAG 12.1 (elevators), 12.2.1, 12.5.2 (entrances need not comply “where security requirements prohibit full compliance”), 12.4.2 (grab bars not required in suicide prevention cells)). ADAAG is set forth at Part 1191 of Title 36 of the Code of Federal Regulations, and the final rule for Detention and Correctional Facilities is published at 63 Fed. Reg. 2000 (Jan. 13, 1998). The views of state prison officials from 44 states were submitted to the Architectural and Transportation Barriers Compliance Board, which adopted many of their suggestions. *See* 59 Fed. Reg. 31,676; 31,681; 31,687; 31,697-31,711.

## II.

**TITLE II OF THE ADA PROTECTS STATE PRISONERS FROM DISCRIMINATION ON THE BASIS OF DISABILITY.**

**A. Title II Of The ADA Unambiguously Covers State Prisoners.**

Because the plain language of the ADA unambiguously applies to all state entities, including prisons, there is no basis to carve out an exception for state prison inmates. “When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is complete.’” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Title II of the ADA is explicitly universal in scope. It prohibits discrimination by “public entities,” defined as “(A) *any* State or local government; (B) *any* department, agency, special purpose district, or other instrumentality of a State or States or local government . . . .” 42 U.S.C. §12131(1) (emphasis added).<sup>8</sup> This language—*any* state agency or department—cannot possibly be read to exempt state prisons. Conceding this,<sup>9</sup> Petitioners still argue that the statute can be read to exempt prison inmates.

Not surprisingly, given the lack of ambiguity in the statutory language, Petitioners’ argument below was quite different. Rather than contend that the ADA is ambiguous, they argued: “The plain meaning of a statute should not be automatically followed where it ‘will produce a result

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<sup>8</sup>See also 42 U.S.C. §12202 (abrogating States’ Eleventh Amendment immunity).

<sup>9</sup>In their brief to the Third Circuit, Petitioners stated, “Appellees do not argue that all aspects of a correctional facility are immune from application of the ADA. Certainly, the ADA would be applicable to employment of staff and access to buildings open to the public such as general administration areas or visiting areas.” JA 114 n.8. They have not retreated from this position.

demonstrably at odds with the intention of the drafters.” JA 116 (citation omitted).

Here, Petitioners, relying on *Amos v. Maryland Department of Public Safety & Correctional Services*, 126 F.3d 589 (4th Cir. 1997), petition for cert. filed, 66 U.S.L.W. 3474 (U.S. Dec. 19, 1997) (No. 97-1113), attempt to manufacture a “state prisoner” exception to the ADA by ignoring the statutory definitions and ordinary meanings of various statutory terms, none of which is ambiguous. See Brief for the Petitioners (“Pet. Brf.”) at 19-20. Title II provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. §12132. This Section explicitly covers all of the operations of a public agency, including the boot camp operated by the state department of corrections here.

First, Petitioners argue that the terms “program and activity” are undefined and ambiguous. Pet. Brf. 12. Both assertions are incorrect. The term “program or activity” is statutorily defined in Section 504 to encompass “all of the operations of—(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government” (29 U.S.C. §794(b)(1) (emphasis added)) and Congress has directed that the ADA be interpreted in congruence with Section 504. 42 U.S.C. §§12133, 12134, 12201(a).<sup>10</sup> “It is hard to imagine how state correctional programs would not fall within this broad definition.” *Yeskey*, 118 F.3d at 170.<sup>11</sup> Indeed, and contrary to the

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<sup>10</sup>As discussed *infra*, Parts II(C)(1)-(2), Section 504 has consistently been applied to state prison inmates.

<sup>11</sup>A statutory term “must be given its ‘ordinary or natural’ meaning.” *Bailey v. United States*, 516 U.S. 137, 145, 133 L. Ed. 2d 472, 481 (1995):

“Activity” means, *inter alia*, “natural or normal function or operation,” and includes the “duties or function” of “an

(continued...)

Fourth Circuit's surmise that "most prison officials would be surprised to learn that they were required . . . to provide inmates with 'services,' 'programs,' or 'activities' as those terms are ordinarily understood" (*Amos*, 126 F.3d at 601 (some internal quotation marks omitted)), Petitioners themselves frequently refer to "program" or "activity" when discussing state prisons. *See, e.g.*, Pet. Brf. 31-32 (referring to boot camp as "program"). This is unsurprising, as the Pennsylvania statute itself refers to the Boot Camp from which Yeskey was excluded as a "program" that provides "services." PA. STAT. ANN. tit. 61, §1123 (West Supp. 1997). Moreover, the ADA does not apply only to "services, programs, or activities"; in its second clause it affirmatively forbids a public entity from subjecting people with disabilities to discrimination generally. 42 U.S.C. §12132.

Second, Petitioners argue that the term "qualified individual with a disability" is ambiguous because it implies voluntariness and therefore excludes prisoners. The ADA defines a "qualified individual with a disability" as

an individual with a disability who . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. (42 U.S.C. §12131(2))

Nothing in this definition excludes prisoners. The terms "eligible" and "participate" do not "imply voluntariness on the part of an applicant who seeks a benefit from the state." Cf. Pet. Brf. 20. As the Third Circuit held, "the term

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<sup>11</sup>(...continued)

organizational unit for performing a specific function." *Webster's Third New International Dictionary* 22 (1986). "Program" is defined as "a plan of procedure: a schedule or system under which action may be taken toward a desired goal." *Id.* at 1812. Certainly, operating a prison facility falls within the "duties or functions" of local government authorities. (*Yeskey*, 118 F.3d at 170)

'eligibility' simply describes those who are 'fitted or qualified to be chosen,' without regard to their own wishes. *See Webster's Third New International Dictionary*, *supra* at 736." *Yeskey*, 118 F.3d at 173. And, as the dissenting judge in *Amos* correctly noted,

The "voluntary" limitation that the majority opinion imposes would immunize discrimination on the basis of disability in the provision of compulsory services such as public education, mandatory vaccinations, and jury service. Yet several courts, including the Fourth Circuit, have indeed applied the statutes to such mandatory and "involuntary" programs. (*Amos*, 126 F.3d at 615 (Murnaghan, J., dissenting))

Indeed, Petitioners concede that the ADA applies to institutionalization. Pet. Brf. 17. Prison is similar to other institutions; although an inmate does not choose to go to prison, once there he is eligible to receive certain services from the state such as food and medical care merely because he is an inmate. On the other hand, prison inmates are commonly subject to "eligibility" requirements to receive certain prison programs, services, or activities. For example, the statutory definition of the Boot Camp from which Yeskey was excluded is "[a] program in which *eligible* inmates *participate* for a period of six months in a humane program for motivational boot camp . . ." PA. STAT. ANN. tit. 61, §1123 (West Supp. 1997) (emphasis added). The statute specifically defines "eligible inmate"<sup>12</sup> and provides that sentencing judges should identify "those defendants who are eligible for participation in a motivational boot camp" (*id.* §1124), as the judge did in this instance. Having met the eligibility requirements, Yeskey sought only to be free of discrimination based on disability.<sup>13</sup>

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<sup>12</sup>An eligible inmate is a person under the age of 35 serving a relatively short term (two to five years) for a non-violent offense. *See PA. STAT. ANN. tit. 61, §1123 (West Supp. 1997)*.

<sup>13</sup>Yeskey pled that he was qualified to participate in Boot Camp (JA (continued...))

Third, Petitioners argue that the title "public services" excludes state prisoners, because prisons are not open to the public. As discussed above, the term "public entity" is statutorily defined to include "any" State agency or department—not just those open to the "general public."<sup>14</sup> Normal rules of statutory construction require that a common term occurring in several places within a statute be given a single meaning. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 283 (1993). Thus, the term "public services" cannot be reinterpreted to mean only those services open to the general public, when the statute defines "public entity" to mean *any* state agency. Indeed, many services provided by public entities are not available to the public at large, but only to those who meet certain selection criteria: involuntary commitment to a mental hospital, drug treatment facilities, jury duty, even public education.

Finally, Petitioners argue that the statutory goals of the ADA—"to assure equality of opportunity, full participation, independent living, and economic self-sufficiency" so that people with disabilities can "pursue those opportunities for which our free society is justifiably famous"<sup>15</sup>—are incompatible with the Act's application to prison inmates. But the ADA's goals mirror the goals of the Boot Camp, which was created because of the State's desire "to salvage the contributions and dedicated work which its displaced citizens may someday offer." PA. STAT. ANN. tit. 61, §1122 (West Supp. 1997). The statutory objectives of the Boot Camp are to prepare prisoners to be productive members of free

<sup>13</sup>(...continued)

7 ¶14), which must be assumed to be true on this denial of a motion to dismiss.

<sup>14</sup>This is in accord with the common understanding of "public entity" as an agency operated by the government, rather than by the private sector. *See, e.g., Richardson v. McKnight*, —U.S.—, 138 L. Ed. 2d 540, 557 (1997) (Scalia, J., dissenting) (referring to state-run prison as a "public entit[y]").

<sup>15</sup>42 U.S.C. §12101(a)(8), (9).

society. *Id.* §1125(b). Prisons frequently offer programs designed to rehabilitate prisoners and prepare them for life "beyond the walls."<sup>16</sup> Indeed, the modern penitentiary, which had its origins in Pennsylvania, is founded on the notion of rehabilitative and vocational training. *See HARRY ELMER BARNES, THE EVOLUTION OF PENOLOGY IN PENNSYLVANIA* 179-80 (1927).

Accordingly, Petitioners' attempt to manufacture a "state prisoner" exception founders on the plain language of the ADA. Congress did make some exemptions from ADA coverage generally, but there is no state prisoner exception. *See, e.g.,* 42 U.S.C. §12210(a) (current users of illegal drugs not "disabled"); *id.* §12208 (transvestites not "disabled"). When a statute lists specific exemptions, others are not to be judicially implied. *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980).<sup>17</sup>

There are no exceptions to Title II of the ADA, and no ambiguity about the scope of coverage. Thus, this case does not come within the rule of *Gregory v. Ashcroft*, 501 U.S. 452 (1991),<sup>18</sup> where an exception to the scope of

<sup>16</sup>For example, "[i]t is the policy of the Bureau of Prisons to provide work to all inmates (including inmates with a disability who, with or without reasonable accommodations, can perform the essential tasks of the work assignment) contained in a federal institution . . . . This work is designed to allow inmates the opportunity to acquire the knowledge, skills, and work habits which will be useful when released from the institution." 28 C.F.R. §345.10. In contrast, the disabled prisoners in *Amos* alleged that they had been denied "the opportunity to participate in work release and pre-release programs because of their disabilities." *Amos*, 126 F.3d at 591. The Fourth Circuit's decision in that case ensured that this discrimination would continue.

<sup>17</sup>In contrast to Title II of the ADA, which covers *all* "public entities" without exception, the definition of a covered "employer" under Title I of the Act specifically exempts the federal government and federally owned corporations, Indian tribes, and certain non-profit private clubs. 42 U.S.C. §12111(5)(B)(i), (ii).

<sup>18</sup>Under the clear statement rule, "[i]f Congress intends to alter the usual constitutional balance between the States and the Federal

(continued...)

coverage created an ambiguity as to whether the statute was meant to apply to judges. *Id.* at 467. Indeed, in *Gregory*, the broad language of the ADEA would have encompassed state judges had there not been an ambiguous exception to the statute: The “ADEA plainly covers all state employees except those excluded by one of the exceptions. Where it is unambiguous that an employee does not fall within one of the exceptions, the Act states plainly and unequivocally that the employee is included.” *Id.* at 467. Because Title II of the ADA has no exceptions at all, let alone one that could be construed to encompass state prisoners, it must be interpreted to include them.

That the ADA does not explicitly mention prisoners or prisons is not relevant. *Gregory* did not announce an “enumeration” rule, and Congress is not required to list every entity, or every aspect of an entity, that it intends to cover in a statute of general application. Petitioners’ contrary argument “reflects an incorrect understanding of the kinds of laws Congress passes: it usually does not legislate by specifying examples, but by identifying broad and general principles that must be applied to particular factual instances.” *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 475 (1989) (Kennedy, J., concurring).<sup>19</sup> This Court stated in *Gregory* that the clear statement rule does not require Congress to list those state functions it intends to cover. *Gregory*, 501 U.S. at 467 (ADEA need not

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<sup>19</sup>(...continued)

Government, it must make its intention to do so unmistakably clear in the language of the statute.” *Id.* at 460 (internal quotation marks and citations omitted).

<sup>19</sup>Requiring enumeration in broadly worded statutes would have several negative consequences. First, Congress would have to expend scarce legislative resources determining a “laundry list” of traditional state functions. Second, there is a high risk that Congress could inadvertently fail to list a specific state function, particularly since different states typically engage in different functions (i.e., snow removal in New Hampshire and volcano warnings in Hawaii). Third, an enumerated statute is inherently inflexible, making it difficult to adapt to changing circumstances and changing state functions.

“mention judges explicitly”); *see also Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring). Indeed, given Petitioners’ concession that the ADA applies to prison guards and visitors, it is difficult to imagine the statute that Petitioners would ask Congress to draft—not only would it have to list “state prison” as a public entity, but it would have to specify that “guards, visitors, and inmates are protected.” This is not the law. The fact that the ADA encompasses state prisoners, “even though it contains no express provisions to this effect, does not demonstrate ambiguity in the statute: It demonstrates breadth.” *United States v. Monsanto*, 491 U.S. 600, 609 (1989) (internal quotation marks omitted).

Although Petitioners attempt to constitutionalize their argument by referencing the *Gregory* “clear statement rule,” it is evident that they, and the lower court opinions they cite, are actually asking this Court to rewrite the plain language of the ADA by adding a “state prisoner exception” that does not exist in the text. Cf. Pet. Brf. 18-19. A close reading of the cited opinions reveals that the courts there were doing the same thing that Petitioners are doing here: straining to find a perceived ambiguity in the statute so as to find it inapplicable to prisoners, because they believed that application to prisoners would be difficult, and thus could not (or should not) have been intended by Congress. In the leading case of *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995), explicitly followed and adopted by *Amos*, 126 F.3d at 591, the Fourth Circuit acknowledged that the language of the ADA “appears all-encompassing.” *Torcasio*, 57 F.3d at 1344. It then set out in search of ambiguity. Ignoring statutory and dictionary definitions, it relied on intuition, finding that prisons

generally do not provide “services,” “programs,” or “activities” as those terms are *ordinarily understood*. . . . A prisoner is not *normally thought of* as one who would have occasion to “[meet] the essential eligibility requirements” for receipt of or participation in the services, programs, or activities

of a public entity. The terms "eligible" and "participate" *imply* voluntariness on the part of an applicant . . . . (*Id.* at 1347 (emphasis added))

Other cases cited by Petitioners acknowledged the ADA's broad and all-encompassing language but relied exclusively on *Torcasio*'s explication of ambiguity<sup>20</sup> or explicitly acknowledged a judicially created exemption.<sup>21</sup> Many more courts have explicitly found that the plain language of the ADA encompasses state prisoners, or have assumed such coverage—presumably because the statute is *not* ambiguous.<sup>22</sup> Although Chief Judge Posner mused in *dicta* that Congress might not have intended the ADA to apply to prisons, he acknowledged that there is no express exception in the ADA for prisoners, and instead speculated about the possibility of crafting a "[j]udge-made exception . . . to avoid absurdity." *Bryant v. Madigan*, 84 F.3d 246, 248-49 (7th Cir. 1996) (*dicta*). But when squarely confronted with the issue, Judge Posner held that the ADA

<sup>20</sup>The district court here, for example, relied exclusively on *Torcasio* with no independent analysis. JA 98-99. *See also Crawford v. Indiana Dep't of Correction*, 937 F. Supp. 785, 787-88 (N.D. Ind. 1996), *rev'd*, 115 F.3d 481 (7th Cir. 1997) (acknowledging "broad language" defining "public entity" and "program or activity" but relying on *Torcasio* to find ADA inapplicable).

<sup>21</sup>In *King v. Edgar*, No. 96 C 4137, 1996 U.S. Dist. LEXIS 17999 (N.D. Ill. Dec. 9, 1996), the court did not find ambiguity at all, but instead stated "it is so unlikely that Congress envisioned mandating equal participation for disabled prisoners that an exception should be inferred." *Id.* at \*13.

<sup>22</sup>*Armstrong v. Wilson*, 124 F.3d 1019, 1023 (9th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3308 (U.S. Oct. 20, 1997) (No. 97-686); *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481, 486-87 (7th Cir. 1997) (Posner, J.); *Love v. Westville Correctional Ctr.*, 103 F.3d 558, 559 (7th Cir. 1996); *Duffy v. Riveland*, 28 F.3d 447, 452 (9th Cir. 1996); *Key v. Grayson*, No. Civ. A 96-40166, 1998 WL 125769, at \*3-\*4 (E.D. Mich. Mar. 19, 1998); *Randolph v. Rodgers*, 980 F. Supp. 1051, 1059-60 (E.D. Mo. 1997); *Herndon v. Johnson*, 970 F. Supp. 703, 708 (E.D. Ark. 1997); *Kaufman v. Carter*, 952 F. Supp. 520, 529 (W.D. Mich. 1996); *Niece v. Fitzner*, 941 F. Supp. 1497, 1505 (E.D. Mich. 1996); *Dean v. Knowles*, 912 F. Supp. 519 (S.D. Fla. 1996); *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1036-38 (S.D.N.Y. 1995).

applies to state prison inmates. *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481, 486-87 (7th Cir. 1997). Thus, Petitioners' contention that the statute is necessarily ambiguous, because "federal judges across this country sharply disagree" about the applicability of the ADA to prisons, is based on a false premise. Pet. Brf. 18-21.

Because Title II of the ADA unambiguously covers *all* operations of *all* public entities, with no exception, it necessarily prohibits discrimination against state prison inmates with disabilities.

**B. The Clear Statement Rule Should Not Be Applied To Determine Whether The ADA Protects State Prisoners.**

There is no reason for this Court to use the clear statement rule to decide whether Title II of the ADA applies to state prison inmates, because (1) the statute is clear and unambiguous on its face, *see Part II(A), supra*; and (2) determining the conditions of confinement for prison inmates is not the type of sovereign state function implicated by this Court's decision in *Gregory*.

First, the clear statement rule is a tool of statutory interpretation that only is used when a statute is ambiguous. *See Gregory*, 501 U.S. at 461, 470; *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 205-06 (1991); *Salinas v. United States*, —U.S.—, 139 L. Ed. 2d 352, 363 (1997). This Court recently emphasized the important policy reasons for *not* applying the *Gregory* clear statement rule to an unambiguous statute:

Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature. Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, §1, of the

Constitution. (*Salinas*, 139 L. Ed. 2d at 363 (citations and internal quotation marks omitted))

In other words, this Court will not use a canon of *interpretation* to rewrite a statute.

Second, while management of state prison inmates is a function traditionally performed by states, it is not a fundamental attribute of state sovereignty. The clear statement rule is designed to maintain the "delicate balance" between the federal and state governments by insuring that Congress actually intended "to alter the usual constitutional balance." *Gregory*, 501 U.S. at 459-61. It thus applies to "decision[s] of the most fundamental sort for a sovereign entity." *Id.* at 460.<sup>23</sup>

Accordingly, the *Gregory* clear statement rule does not apply to *any* federal law that impinges on a function that has traditionally been performed by the states, but only to federal laws directly impinging on a state's sovereignty as expressly guaranteed by the Constitution.<sup>24</sup> This reading of *Gregory* is consistent with *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546-47 (1985), in which this Court "reject[ed], as unsound in principle and

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<sup>23</sup>To the extent there was any ambiguity in *Gregory* with respect to whether it applied only to "federal regulation of the qualifications of state officials" or "more broadly to the regulation of any 'state governmental functions'" (cf. *Gregory*, 501 U.S. at 478 (White, J., concurring and dissenting)), this Court clarified the rule in *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 131 L. Ed. 2d 801 (1995), by limiting the clear statement rule to "a provision going 'beyond an area traditionally regulated by the States' to implicate 'a decision of the most fundamental sort for a sovereign entity.'" 514 U.S. at 732 n.5, 131 L. Ed. 2d at 809 n.5.

<sup>24</sup>With the exception of the Fourth Circuit, all Courts of Appeals to consider the issue have declined to apply *Gregory* to "traditional" state functions. See *United States v. Lot 5, Fox Grove*, 23 F.3d 359, 362 (11th Cir. 1994) (homestead protection); *Reich v. New York*, 3 F.3d 581, 589-90 (2d Cir. 1993) (law enforcement); *Gately v. Massachusetts*, 2 F.3d 1221, 1230 (1st Cir. 1993) (law enforcement); *EEOC v. Massachusetts*, 987 F.2d 64, 67-70 (1st Cir. 1993) (state employees).

unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'" In large measure this was because the line proved, in practice, impossible to draw. *See id.* at 538-39 (comparing judicial decisions finding a "traditional" state activity with those declining to so find). However, the Court in *Garcia* also noted certain "rare exceptions, like the guarantee, in Article IV, Section 3, of state territorial integrity" in which the Constitution *does* "carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace." *Id.* at 550. This Court in *Gregory* relied on another such "express element of state sovereignty" guaranteed by the Constitution—the guarantee of a Representative government. *Gregory*, 501 U.S. at 463 (citing U.S. CONST. art. IV, §4). The other clear statement rule is based on States' immunity from suit, which is guaranteed by the Eleventh Amendment.<sup>25</sup>

Moreover, management of state prison inmates—that is, determining the *conditions* of their confinement—could not be the type of "core" state function this Court had in mind in *Gregory*. To the contrary, there always has been a place for federal oversight of state prisons. The Court's deference to prison administrators is a policy of restraint, not abdication. *See, e.g., Turner v. Safley*, 482 U.S. 78, 84-85, 99-100 (1987) (striking down prohibition on inmate marriages).

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<sup>25</sup>Certainly, *Gregory* did not purport to overrule longstanding preemption doctrine. *Gregory* did not substitute a requirement that congressional intent be clear in the text of the statute for the normal rule, which requires only that "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." *Gregory*, 501 U.S. at 461 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). *Rice* was a standard statutory construction case in which this Court relied explicitly on legislative history to determine Congressional intent, rather than requiring a "clear statement" in the text of the statute itself. 331 U.S. at 232-36; *see also United States v. Bass*, 404 U.S. 336, 344-47 (1971) (examining legislative history).

Moreover, Petitioners concede that the ADA applies to certain aspects of prison management—including the employment of prison staff and treatment of visitors. JA 114. If the operation of state prisons were truly a core state function, then employment of guards (who are ultimately responsible for prison security and for enforcing the prison administration's policy choices) would also be a "traditional" state function to which the clear statement rule applied. *Cf. National League of Cities v. Usery*, 426 U.S. 833, 851 (1976) (discussing importance of State's "abilities to structure employer-employee relationships"). Of course, this is not the law. Courts do not refuse to apply Title VII or the ADA to prison employment situations, despite security issues that may differentiate prisons from most other functions traditionally performed by states; instead, security is taken into account in deciding the reasonableness of a requested accommodation. *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 331-36 (1977) (gender is a bona fide occupational qualification that may, consistent with Title VII, disqualify women for employment as corrections officers in certain circumstances); *Miller v. Illinois Dep't of Corrections*, 107 F.3d 483, 485 (7th Cir. 1997) (person with severe vision impairment not "otherwise qualified" to serve as prison guard).<sup>26</sup>

Finally, Title II of the ADA clearly was intended to alter the federal-state balance of powers: it expressly applies to states, and abrogates their Eleventh Amendment immunity. Congress explicitly intended to eliminate discrimination in institutions traditionally operated by states such as schools,

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<sup>26</sup>The fact that states often contract out prison operations also indicates that management of prisoners is not the type of "core" state function implicated in *Gregory*. *See, e.g., Richardson v. McKnight*, -U.S.-, 138 L. Ed. 2d 540, 547-49 (1997) (discussing history of private prisons, including a limited prison contracting system in Pennsylvania); T. Don Hutto, *The Privatization of Prisons*, in *ARE PRISONS ANY BETTER?* 111, 124-25 (J. Murphy & J. Dison eds., 1990) (noting increase in number of profitable private prison companies, and states contracting for such services).

courts and hospitals. Petitioners have failed to distinguish management of state prisoners from these other "traditional" state functions that are concededly covered by the ADA. They cannot explain how applying the ADA to state prisoners encroaches on the states' sovereignty any more than applying the ADA to other state functions.

**C. Under Normal Rules Of Statutory Construction, The ADA Should Be Applied To State Prisoners.**

**1. The ADA Incorporates Section 504 Regulations That Have Consistently Applied To Prisons.**

Title II of the ADA incorporates the Department of Justice ("DOJ") Section 504 regulations, which have applied to prisons for almost two decades. In enacting Title II Congress *expanded* the scope of coverage of Section 504 so that *all* programs, services, or activities of state and local governments, and not just those that receive federal funds, would operate free of disability-based discrimination. *See* H.R. REP. NO. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 366. Title II explicitly adopted two sets of DOJ Section 504 regulations: the DOJ "coordination" regulations, codified at 28 C.F.R. pt. 41, and the DOJ "federally conducted" regulations codified at 28 C.F.R. pt. 39. 42 U.S.C. §12134(b).<sup>27</sup> The coordination regulations direct federal agencies to promulgate their own Section 504 regulations and to "include, where appropriate, specific provisions adapted to the particular programs and activities receiving financial assistance from the agency." 28 C.F.R. §41.4(c). The DOJ's own recipient regulations (codified at 28 C.F.R. part 42) were consistent with that approach, specifically referring to programs that received

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<sup>27</sup>Section 12134(b) refers to "the coordination regulations under Part 41 of title 28, Code of Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978)." These HEW regulations were adopted by the DOJ when it took over coordination responsibilities. *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634 n.14 (1984).

federal financial assistance from DOJ, including prisons. *See* 28 C.F.R. §42.540(h) (1980) (defining "program" to include "operations of . . . department of corrections"); 28 C.F.R. §42.540(j) (1980) ("Benefit" includes provision of services . . . (i.e. . . . confinement . . . )); 45 Fed. Reg. 37,621 (1980) (qualified interpreters important in correctional rehabilitation settings); 45 Fed. Reg. 37,627 (1980) ("prisoners" as covered beneficiaries); 45 Fed. Reg. 37,630 (1980) (specific discussion of application of Section 504 to prisons). Additionally, as of 1988, recipients of federal funds were required to comply with the Uniform Federal Accessibility Standards ("UFAS"), 41 C.F.R. subpt. 101-19.6, App. A. *See* 28 C.F.R. §42.522(b). UFAS requires that 5% of "residential units" in "Jails, Prisons, Reformatories, Other detention or correctional facilities" be constructed in accordance with the accessibility standards. 41 C.F.R. subpt. 101-19.6, App. A §4.1.4(9)(c). For the purposes of "program accessibility, existing facilities" and "communication" Congress codified the DOJ "federally-conducted" regulations, 28 C.F.R. pt. 39. 42 U.S.C. §12134(b). These regulations have also consistently been applied to prisons,<sup>28</sup> and incorporate the UFAS standards which explicitly apply to prisons. *See* 28 C.F.R. §39.150 (requiring alterations to meet accessibility requirements of regulations implementing Architectural Barriers Act of 1968, UFAS).

Congress explicitly directed that "nothing in [the ADA] shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 (29 U.S.C. §790 *et seq.*) or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. §12201(a).<sup>29</sup> We must assume that Congress reviewed the

<sup>28</sup>*See* 28 C.F.R. pt. 39, Editorial Note at 686 (describing "Federal prison system" as "programs that provide Federal services or benefits"); 28 C.F.R. §39.170(d) (grievance procedure for federal prisoners under Rehabilitation Act). These regulations were submitted to Congress for approval. *See* 28 C.F.R. pt. 39, Editorial Note at 685.

<sup>29</sup>According to the committee report, "nothing in the ADA is intended (continued...)

"federally assisted" regulations before deciding to approve them in the ADA (*see Traynor v. Turnage*, 485 U.S. 535, 546 (1988)); we know that the "federally conducted" regulations were reviewed. *See* 28 C.F.R. pt. 39, Editorial Note at 685. When Congress voices its approval of an administrative interpretation of a statute, "Congress is treated as having adopted that interpretation, and this Court is bound thereby." *United States v. Board of Comm'rs*, 435 U.S. 110, 134-35 (1978); *see also Consolidated Rail Corp.*, 465 U.S. 624, 634-35 & nn.14, 16 (1984) (enforcement regulations under Section 504 "particularly merit deference" because Congress incorporated the substance of the regulations into the statute).

## 2. The Legislative History Supports Application Of The ADA To Prisons.

Congress intended that the ADA and Section 504 apply to prisoners. Congress was involved in the formulation of the Section 504 regulations which are incorporated in Title II, and endorsed them in their final form, as this Court recognized in *Consolidated Rail Corp. v. Darrone*, 465 U.S. at 634. During hearings on the progress of these regulations, the official in charge of developing them was specifically asked whether they would apply to convicts. He explained that "[o]bviously, someone who is a convict or an ex-convict who otherwise fits the definition of a handicapped person would be covered within the definition of handicapped persons." *Rehabilitation of the Handicapped Programs, 1976: Hearings Before the Subcomm. on the Handicapped of the Comm. on Labor and Public Welfare*, 94th Cong. 1513 (1976).

In 1987, Congress passed the Civil Rights Restoration Act, Pub. L. No. 100-259, to overturn the Court's decision

<sup>29</sup>(...continued)

or should be construed to limit the scope of coverage or to apply lesser standards than are required under title V of the Rehabilitation Act of 1973, or the regulations implementing that title." H.R. REP. NO. 101-485(III), at 69 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 492.

in *Grove City College v. Bell*, 465 U.S. 555 (1984), which had narrowly interpreted the prohibition on sex discrimination in federally funded programs under Title IX, 20 U.S.C. §1681, to apply only to the actual program that received the federal funds. See S. REP. NO. 100-64, at 3-5 (1988), reprinted in 1988 U.S.C.C.A.N. 3, 4-7; *Consolidated Rail Corp.*, 465 U.S. at 635. Because “Congress intended that Title VI as well as its progeny—Title IX, Section 504, and the [Age Discrimination Act]—be given the broadest interpretation” (1988 U.S.C.C.A.N. 3, at 9), it explicitly broadened the definition of “program or activity” to prevent application of *Grove City* to a whole range of institutions that received federal funds, including prisons:

Clear violations of federal law go uncorrected while students lose valuable educational benefits that can rarely be recovered and employees lose jobs or job opportunities. Prolonged debate takes place over what constitutes a “program or activity” under the civil rights law, while the universities, schools, and *correctional facilities* receive millions of federal dollars. (*Id.* at 9 (emphasis added))

Prior to enacting the ADA, Congress heard and read testimony about the need to end discrimination against people with disabilities in all aspects of law enforcement, including the treatment of arrestees and inmates. For example, as Petitioners acknowledge (Pet. Brf. 16), Congress relied heavily on the United States Commission on Civil Rights report, *Accommodating the Spectrum of Individual Abilities* (1983), which was entered as testimony before several House and Senate subcommittees. See S. REP. NO. 101-116, at 6 (1989); H.R. REP. NO. 101-485(II), at 28 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 310. This report specifically identified the criminal justice system, including prisons, as a setting in which disability discrimination occurs. For example, the report lists “[i]nadequate treatment and rehabilitation programs in penal and juvenile facilities,” “[i]nadequate ability to deal with physically handicapped accused persons and convicts (e.g., accessible

jail cells and toilet facilities)” and “[a]buse of handicapped persons by other inmates.” *Accommodating the Spectrum* at Appendix A. Congressional subcommittees heard or read testimony about hearing-impaired people who were arrested and held in jail overnight without knowing their rights or even what they were being held for, and an HIV-positive man arrested in Kentucky and locked outside in a car overnight rather than being admitted into the jail.<sup>30</sup> The House Committee Report noted that

persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid for seizures. Often, after being arrested, they are deprived of medications while in jail, resulting in further seizures. (H.R. REP. NO. 485(III), at 50 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 473)

Moreover, when Congress enacted the ADA, Section 504 had been applied to state prisons in several reported cases. See *Bonner v. Lewis*, 857 F.2d 559, 562 (9th Cir. 1988); *Journey v. Vitek*, 685 F.2d 239, 241-42 (8th Cir. 1982); *Kendrick v. Bland*, 541 F. Supp. 21, 39-40 (W.D. Ky. 1981); *Sites v. McKenzie*, 423 F. Supp. 1196, 1197 (N.D. W. Va. 1976). Congress is presumed to be aware of existing legal precedent and to take it into consideration when it enacts legislation. *Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979). Here such a presumption is especially fitting, as Congress enacted the ADA specifically to broaden—not to narrow—Section 504’s coverage.

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<sup>30</sup>*Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Relations*, 101st Cong. 254 (1989); *Americans with Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Subcomm. on the Handicapped of the Comm. on Labor and Human Relations*, 100th Cong. 77 (1988).

### 3. Department Of Justice Regulations Applying The ADA To Prisoners Are Entitled To Great Deference.

Congress explicitly delegated authority to the Department of Justice to construe the ADA by regulation. 42 U.S.C. §12134(a). Therefore, courts interpreting the ADA must give these regulations legislative and hence "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

A statute's construction by the agency charged with administering it "may not be disturbed . . . if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent." *Rust v. Sullivan*, 500 U.S. 173, 184 (1991). Because there is nothing in the language of the statute or in the legislative history that indicates that Congress intended to exclude prisoners from Title II, the construction of the Department of Justice, which is consistent with the existing agency construction of Section 504 when Congress incorporated it into Title II, is entitled to substantial deference.

The ADA's implementing regulations state that the Act is to be applied to state prisons. The DOJ is specifically responsible for implementing ADA compliance procedures for "correctional institutions." 28 C.F.R. §35.190(b)(6). Additionally, the DOJ's interpretative analysis discusses state prisoners:

A public entity is not, however, required to provide attendant care, or assistance in toileting, eating, or dressing to individuals with disabilities, *except in special circumstances, such as where the individual is an inmate of a custodial or correctional institution.* (28 C.F.R. pt. 35, App. A, at 478 (emphasis added))

Moreover, the building standards approved by the DOJ under the ADA (a choice of either UFAS or ADAAG), contain specific guidelines for accessibility in jails and prisons. 28 C.F.R. §§35.150(b)(1), 35.151(c); 41 C.F.R. subpt. 101-19.6, App. A §4.1.4(9)(c); 63 Fed. Reg. 2000, 2046-2048 (Jan. 13, 1998) (to be codified at 36 C.F.R. pt. 1191, §12).

### 4. A Judicially Created Exemption To The ADA For State Prisoners Is Not Warranted.

Petitioners, not having any support for their position in the language of the statute, its legislative history, or its implementing regulations, resort to speculation about what might happen if the ADA were to be applied to prisoners, and urge this Court to exempt state prison inmates from the ADA's protection based on an imaginary parade of horribles. Petitioners' purported policy justifications, however, fail to demonstrate that application of the ADA to state prisoners is absurd, unexpected, or even unwise.

Although this Court has the power to "amend" the plain language of a statute, that power is to be exercised under very limited circumstances: "[w]here the plain language of the statute would lead to 'patently absurd consequences' . . . that Congress could not possibly have intended." *Public Citizen*, 491 U.S. at 470 (Kennedy, J., concurring); *see also United States v. Locke*, 471 U.S. 84, 95 (1985). If the exception were not thus limited, it would "allow judges to substitute their personal predilections for the will of the Congress." *Public Citizen*, 491 U.S. at 474 (Kennedy, J., concurring). Because application of the ADA does not lead to "patently absurd" results, its plain language cannot be ignored.<sup>31</sup>

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<sup>31</sup>Moreover, if this Court believes that applying the plain language would lead to absurd results, it *must* look to legislative history to determine congressional intent. *Public Citizen*, 491 U.S. at 454; *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (continued...)

In many relevant respects prisons are similar to numerous other government institutions such as mental hospitals, universities and homeless shelters where state officials have the responsibility under the ADA for providing basic, life-sustaining services. Petitioners' concession that the ADA applies to prison employees and visitors undercuts their argument that the management of prisons qua prisons is always different than management of other state activities. Moreover, there are many modifications that will not conflict with any of the security interests that may set prisons apart from other public institutions or agencies. For example, constructing a ramp to the infirmary or classroom for prisoners who use wheelchairs and providing emergency warning systems for deaf prisoners will foster rather than hinder legitimate penological objectives.<sup>32</sup>

Nor is there merit to Petitioners' argument that the purpose of the ADA is to reduce the "dependency and nonproductivity" of people with disabilities, and that, because prisoners are already dependent on their custodians, applying the ADA to prisoners will increase, rather than decrease, the costs of dependency. Pet. Brf. 14. Petitioners focus only on the purported costs of accommodating prisoners with disabilities while in prison, and ignore the fact that most prisoners are eventually released from prison. See *Turner*, 482 U.S. at 96. If prisoners with disabilities are forced to sit idle in their cells, rather than taking part in educational or vocational training,

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<sup>31</sup>(...continued)

(it is appropriate to consult legislative history to ensure that there is not a shred of evidence to support the purported "absurd" result).

<sup>32</sup>There undoubtedly will be cases where a security issue is presented. See, e.g., Brief of Amici Curiae Nevada, et al. at 3 (suggesting that violent inmate using a prosthetic device as a weapon implicates security concerns). In such a case, prison officials would not be required to allow the inmate to continue using the device around others if this would create a significant security risk. See *School Board v. Arline*, 480 U.S. 273, 286 n.15 (1987).

they are more likely to lead lives of "dependency and nonproductivity" upon release; if they are given equal opportunities in prison, they have a chance to compete equally upon release.<sup>33</sup>

Chief among Petitioners' concerns is the threat of ADA litigation by prisoners. See Pet. Brf. 10, 14-15. However, a statute is not absurd because it grants individuals legal rights. Petitioners fundamentally misapprehend both the ADA and the function of the judiciary when they contend that "federal courts will be used to reconstruct prison cells, to alter scheduling of inmate movements and assignments, and to interfere with security procedures." Pet. Brf. 10.<sup>34</sup> The ADA does not authorize or require what Petitioners claim to fear. To the contrary, it requires only reasonable modifications to avoid discriminating against individuals with disabilities. Moreover, it is Petitioners' obligation to obey federal law, and generally states can be expected to follow the law without interference by courts. It is only when Petitioners disobey the law that a federal court might order Petitioners to do that which they should have done

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<sup>33</sup>Indeed, studies in Pennsylvania and elsewhere demonstrate that inmate participation in vocational training and prison industry programs reduces recidivism and increases post-release employment. See, e.g., PENN. DEP'T OF EDUC. FINAL REPORT: A PROGRAM TO REINTEGRATE PENNSYLVANIA INMATES THROUGH LIVE WORK AND COMMUNITY INVOLVEMENT 34, 56-62 (June 30, 1996); WILLIAM G. SAYLOR & GERALD G. GAES, U.S. FED. BUREAU OF PRISONS INTERIM REPORT: THE EFFECT OF PRISON WORK EXPERIENCE, VOCATIONAL AND APPRENTICESHIP TRAINING ON THE LONG-TERM RECIDIVISM OF U.S. FEDERAL PRISONS 4-5 (Nov. 1995).

<sup>34</sup>Petitioners' reliance on the *Purcell* case is misplaced. Contrary to their assertion, the district court did *not* hold that prison officials "had an obligation to "accommodate" Purcell's Tourette's by permitting him to return to his cell when he needed to release his verbal and motor tics." Pet. Brf. 16 n.5 (quoting *Purcell v. Pennsylvania Dep't of Corrections*, No. 95-6720, 1998 U.S. Dist. LEXIS 105, at \*26 (E.D. Pa. Jan. 9, 1998)). Instead, the court denied defendants' motion for summary judgment because punishing Purcell for remaining in his cell to release his tics, despite the fact that *prison doctors* had provided Purcell with medical authorization to return to his cell to alleviate his tics, "might violate Title II." *Id.* at \*27 (emphasis added).

without judicial prompting: obey the law.<sup>35</sup> Even then, following well-established principles of judicial deference to state prison authorities, courts are to give prison officials an opportunity to themselves devise a remedial plan that complies with the ADA. *See Lewis v. Casey*, 518 U.S. 343, 135 L. Ed. 2d 606, 625 (1996).

Nor is there any merit to Petitioners' claim that the sheer number of prisoners with disabilities mitigates *against* applying the ADA to prisons; it simply demonstrates why Congress enacted the ADA as an extremely broad and comprehensive statute, designed to cover all possible places in which people with disabilities might find themselves.

### III.

#### THE COURT SHOULD NOT REACH THE CONSTITUTIONAL ISSUES.

Petitioners have not directly challenged the constitutionality of the ADA, but have only raised the constitutional issues to persuade the Court to apply the clear statement rule. Thus, there is no reason for the Court to directly address these issues.

There also are sound prudential reasons for not deciding the constitutional issues. Because Petitioners did not raise any constitutional questions in the courts below (see JA 103), and those courts did not have an opportunity to rule on these issues, this Court does not have the benefit of lower court opinions squarely addressing the constitu-

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<sup>35</sup>*See Lewis v. Casey*, 518 U.S. 343, 135 L. Ed. 2d 606, 617 (1996) ("It is for the courts to remedy past or imminent official interference with individual inmates' [legal rights]; it is for the political branches of the State and Federal Governments to manage prisons in such fashion that official interference with the [legal rights] will not occur. Of course the two roles briefly and partially coincide when a court, in granting relief against actual harm that has been suffered, or that will imminently be suffered, by a particular individual or class of individuals, orders the alteration of an institutional organization or procedure that causes the harm").

tional issues, nor of fully crafted arguments tested in the crucible of the lower courts. *See Taylor v. Freeland & Krons*, 503 U.S. 638, 646 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992). Nor is there any split of authority in the Circuit Courts requiring dedication of the Court's scarce resources.<sup>36</sup> *See Yee*, 503 U.S. at 537-38.

### IV.

#### PETITIONERS' CONSTITUTIONAL ARGUMENTS HAVE NO MERIT.

##### A. Petitioners' "As Applied" Challenge To The Statute Is Too Broad.

In addition to sound prudential reasons for not deciding the constitutional issues, there is a fundamental problem with Petitioners' analysis. Petitioners have virtually ignored the facts of Yeskey's case in favor of a constitutional attack against the ADA as applied to all prisoners with disabilities in all state prisons under all circumstances. This wide-ranging, unfocused challenge should not be accepted by the Court because there is no record of an actual or imminent application that would present the constitutional question in a "clean-cut and concrete form." *Cf. Renne v. Geary*, 501 U.S. 312, 322 (1991). Any particular application that could cause a constitutional infirmity might require a limiting construction rather than invalidating the protections of the ADA for an entire class.

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<sup>36</sup>To our knowledge no Circuit Court has determined whether the ADA—as applied to prisoners or otherwise—is within Congress's Commerce Clause powers. Three Circuit Courts have held that Congress acted constitutionally in abrogating the States' 11th Amendment immunity from suit, and in doing so held that Congress properly exercised its 14th Amendment powers to enact the ADA. *See Coolbaugh v. Louisiana*, -F.3d-, No. 96-30664, 1998 WL 84123, at \*3-\*8 (5th Cir. Feb. 27, 1998); *Clark v. California*, 123 F.3d 1267, 1270-71 (9th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3308 (U.S. Oct. 20, 1997) (No. 97-686); *Crawford*, 115 F.3d at 487 (decided before this Court's decision in *City of Boerne v. Flores*).

*Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991); *Burson v. Freeman*, 504 U.S. 191, 210 n.13 (1992) (plurality opinion).

Even if Petitioners' broad challenge is accepted, to succeed on this appeal from a motion to dismiss they must prove that there is no set of facts upon which Yeskey or any other disabled prisoner could constitutionally prevail. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Petitioners cannot meet their burden. For example, at trial the evidence may show that there is no sound reason for excluding Yeskey from Boot Camp. In another case, there may be no legitimate penological justification for prohibiting an inmate who uses a wheelchair from eating in the dining hall. The fact that there might conceivably be other circumstances which raise constitutional questions about the application of the ADA is insufficient reason to hold the statute unconstitutional. See *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Should a conflict with penological interests arise in a specific case, the ADA is sufficiently flexible to provide ample opportunity to adjust the relief to the prison setting, or to deny any relief at all. See Parts I and II(C)(4), *supra*. The Court need not resolve the constitutional issues since it must presume that the lower courts will construe the statute so that it is consistent with the Constitution.

#### **B. Congress Properly Exercised Its Powers Under Section 5 Of The 14th Amendment.**

If the Court elects to reach the constitutional issues, the judgment should still be affirmed because the ADA was properly enacted by Congress.

Petitioners concede that Congress properly enacted the ADA to enforce the Equal Protection Clause of the Fourteenth Amendment pursuant to its express power under Section 5 of that Amendment. Pet. Brf. 26. Petitioners claim, however, that there is a serious question about whether Congress could constitutionally apply the ADA to the "management of state prisons." *Id.* But

Congress constitutionally enacted the ADA as a comprehensive remedy to eliminate the undisputed evil of pervasive invidious discrimination against individuals with disabilities, regardless of where the discrimination takes place. The types of discrimination faced by prisoners with disabilities are often the same as those in other environments, and the fact that prisoners are completely dependent upon prison officials for satisfaction of their basic needs makes the discrimination more pernicious. There is no constitutionally acceptable reason for the ADA's protection against discrimination to stop at the prison gates.

#### **1. Congress Has Broad Powers To Enact Remedial And Preventative Legislation To Enforce The Equal Protection Clause In State Prisons.**

Over a century ago the Court recognized Congress's broad powers:

Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power. (*Ex parte Virginia*, 100 U.S. 339, 345 (1880) (quoted with approval in *City of Boerne v. Flores* —U.S.—, 138 L. Ed. 2d 624, 637 (1997))

Congressional power under Section 5 of the Fourteenth Amendment extends beyond principles of federalism and overrides the sovereign powers of the States. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

Last Term the Court reaffirmed that Congress has the power and the duty under Section 5 to use "strong remedial and preventive measures to respond to the widespread and persisting deprivation of constitutional rights . . ." *City of*

*Boerne v. Flores*, –U.S.–, 138 L. Ed. 2d 624, 642 (1997). Congress must determine in the first instance what legislation is necessary to protect Fourteenth Amendment freedoms and “its conclusions are entitled to much deference.” *Id.* at 649. Congress must have the “necessary latitude to try new techniques” to achieve the goal of equality. *Fullilove v. Klutznick*, 448 U.S. 448, 490 (1980) (plurality opinion).

## 2. As Applied To State Prisoners The ADA Is A Constitutional Exercise Of Congress's Remedial Powers.

Petitioners concede that Congress had ample evidence of unconstitutional discrimination against individuals with disabilities, and that the means Congress chose to remedy that discrimination in free society is “‘proportionate to the ends legitimate under §5.’” Pet. Brf. 13, 26. They also concede that prison employees and visitors are entitled to protection and reasonable modifications under the ADA. JA 114 n.8. Thus, Petitioners’ broad contention that the ADA is entirely inconsistent with the management of state prisons is wrong by their own admission. Moreover, the premise of Petitioners’ position—that the ADA is not congruent and proportional when applied to prisoners—is not correct.

Petitioners’ argument comes down to the claim that the Court should create a special exception and hold that the ADA does not apply to prisoners under any circumstances, even to provide the same reasonable modifications that are concededly required to accommodate prison guards and visitors. This claim is contrary to the language of the ADA, to logic and to common sense. Nor is the claim supported by the sole authority Petitioners cite, *City of Boerne*.

In *City of Boerne* the Court held that the Religious Freedom Restoration Act (RFRA), was unconstitutional because it intended a substantive change in the meaning of the Free Exercise Clause by expressly overruling one of the Court’s decisions interpreting that clause. 138 L. Ed. 2d at

634, 644-49. Recognizing that the difference between remedial legislation and substantive change is one of degree, the Court looked to the essential ingredients of remedial legislation—“congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end”—to weed out statutes that unmistakably fall on the wrong side of the line. *Id.* at 638. “Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.” *Id.* at 645.

The Court had little trouble recognizing that Congress had made a drastic change in the law when it enacted RFRA. Before RFRA all neutral state laws that had an incidental burden on religion were constitutional under *Employment Division, Dep’t of Human Resources v. Smith*, 494 U.S. 872, 888-89 (1990); after RFRA most of those same state laws would fall. 42 U.S.C. §2000bb-1 (any incidental impact would require government to prove that law was least restrictive alternative that furthered compelling state interest). And there was little doubt about Congress’s intent—it enacted RFRA to overrule *Smith*. See 42 U.S.C. §2000bb(a), (b). Thus, RFRA did not embody the same “substantive constitutional value” that the Supreme Court had given to the Free Exercise Clause. D.O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance Of An Unconstitutional Statute*, 56 MONT. L. REV. 39, 64 (1995).

In contrast to RFRA, the ADA is consistent with and supplements the substantive values embodied in the Equal Protection Clause, as interpreted by *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). In that case the Court unanimously applied the Equal Protection Clause to strike down discriminatory conduct directed against individuals with a disability (mental retardation). The Court recognized that people with mental retardation are subject to negative attitudes, fear and irrational prejudice, and that invidious discrimination against them was likely to continue. *Id.* at 446, 448, 450.

This observation, as applied to all individuals with disabilities, including prisoners, expresses well the findings and purposes that underlie the ADA. See 42 U.S.C. §12101(a)(7), (8) and (b)(1). The heart of the statute expresses in plain terms the meaning of the Clause as it has been applied to people with disabilities: "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity." 42 U.S.C. §12132.

This general anti-discrimination provision and its constitutional foundation are equally applicable to prisoners. Since Petitioners agree that prisoners retain their right to be free of discrimination under the Constitution, Pet. Brf. 28, Congress can enforce Section 5 so that they are. *Turner v. Safley*, 482 U.S. at 84 (prisoners retain the right to be free of unconstitutional discrimination); *Lee v. Washington*, 390 U.S. 333, 333-34 (1968) (per curiam) (same).

**a. Applying The ADA To Prisoners Is Consistent With The Court's Interpretation Of The Equal Protection Clause.**

Petitioners argue that the ADA as applied to state prisoners is unconstitutional because Congress has changed the meaning of the Equal Protection Clause by positioning the level of scrutiny of prison officials' actions above the constitutional floor. Pet. Brf. 30. Petitioners argue that the ADA changes the meaning of the Constitution because the Department of Justice regulations implementing the ADA require something more than the rational basis test announced in *City of Cleburne* and the prison specific test announced in *Turner v. Safley*, 482 U.S. at 89. In this way, Petitioners argue, the ADA as applied to prisons is like RFRA in that it changes the meaning of the Constitution. Pet. Brf. 28.

Petitioners' argument misses a critical distinction between changing the substantive meaning of the Constitution and adopting a remedy that is different than the type and level of scrutiny employed by the judiciary in individual cases in the absence of "controlling congressional direction." *Cleburne*, 473 U.S. at 439. As long as Congress acts in a manner consistent with the Court's interpretation of the Equal Protection Clause to deter or remedy unconstitutional violations, which it did, it has the power under Section 5 to employ in the ADA remedies that will prohibit "conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the states.'" *City of Boerne v. Flores*, 138 L. Ed. 2d at 637 (emphasis added); *Fullilove v. Klutznick*, 448 U.S. at 483-84, 490 (plurality opinion) (Congress is not limited to judicial remedies and has latitude to try new techniques).<sup>37</sup> Thus, Congress has the authority, in appropriate circumstances, to make unlawful the specific actions that the Court has declined to find unconstitutional, and those that the judiciary has specifically found to be constitutional. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 333-34 (1966); *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966); *City of Rome v. United States*, 446 U.S. 156 (1980).<sup>38</sup>

These principles and the cases that confirmed them all met with approval in *City of Boerne*, 138 L. Ed. 2d at 637-38. Nothing in the ADA requires more of state officials than the

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<sup>37</sup>"[I]n no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress" to enforce the Equal Protection Clause. *Fullilove v. Klutznick*, 448 U.S. at 483 (plurality opinion). The Court owes Congress the greatest deference in the selection of "instrumentalities to perform a function that is within its power." *Id.* at 480.

<sup>38</sup>*South Carolina v. Katzenbach* and *City of Rome* concerned the scope of Congress's authority under Section 2 of the Fifteenth Amendment. Because congressional authority under this Section is the same as that under Section 5 of the Fourteenth Amendment, the Court has relied on cases under both sections interchangeably. *South Carolina v. Katzenbach*, 383 U.S. at 326.

statutes did in these cases. Thus, any perceived enhancement of judicial scrutiny of actions by prison officials does not by itself cause the ADA or any other statute to fall outside the scope of Congress's power under Section 5 of the Fourteenth Amendment. "It has never been seriously maintained . . . that Congress can do no more than the judiciary to enforce the [Fourteenth] Amendment's commands."<sup>39</sup> *City of Rome*, 446 U.S. at 210 (1980) (Rehnquist, J., dissenting); *Clark v. California*, 123 F.3d at 1271 (Congress's powers are not confined by the level of judicial scrutiny).

It would be inconsistent with Congress's institutional capabilities to limit its remedial powers to those employed by the judiciary. The *Cleburne* and *Turner* tests were both adopted in large part because the Court believed that the legislature and the executive branches, rather than the judiciary, should have the primary responsibility for deciding how persons with disabilities and prisoners should be treated. *Turner*, 482 U.S. at 84-85 ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government"); *City of Cleburne*, 473 U.S. at 440 (absent congressional direction, courts devise standards of review); *id.* at 442-43 ("How this large and diversified group is to be treated under the law is a difficult and often a technical matter very much a task for legislators guided by qualified professionals and not by perhaps ill-informed opinions of the judiciary").

The legislative and the executive branches (after exhaustive study and long experience) have now spoken through the ADA and the Department of Justice implementing regulations, and have chosen those remedies that in prison and elsewhere most appropriately balance the

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<sup>39</sup>Any other rule would confine Congress's power to the "insignificant role" of abrogating laws that the judiciary was prepared to find unconstitutional. *Katzenbach v. Morgan*, 384 U.S. at 649.

competing interests. Indeed, in *Cleburne* the Court applauded the national legislative response and cited with approval the ADA's predecessor, Section 504 (which was applied by regulations to state prisons). See *Cleburne*, 473 U.S. at 443-45 ("a civilized and decent society expects and approves such legislation"). That legislative response does not become unconstitutional, as Petitioners contend, because the other branches of government employed a different means of enforcing constitutional rights of disabled persons than that adopted by the Court—particularly because the judicially created test was specifically designed to permit the Legislature "flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts." *Id.* at 445; see also *Coolbaugh v. Louisiana*, 1998 WL 84123, at \*6 (deference to Congress particularly appropriate because *Cleburne* held it was appropriate branch to make findings and decisions on treatment of disabled).

**b. The Legislative Record Is Sufficient To Support The ADA's Application To State Prisoners.**

Again relying on *City of Boerne*, Petitioners maintain that no legislative response is appropriate to enforce the Fourteenth Amendment because there is no information in the legislative record indicating that discrimination against state prisoners with disabilities is a widespread problem. Pet. Brf. 26. Congress is not required to legislate so narrowly. Prisoners with disabilities, like others in the community and in different types of institutions, are entitled to protection from discrimination.<sup>40</sup> "In the interests of uniformity, Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records." *Oregon v.*

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<sup>40</sup>As set forth *supra*, Part II(C)(2), and in Brief for Amici Curiae the National Advisory Group for Justice, et al., Congress had evidence of discrimination in the criminal justice system in general and against prisoners in particular.

*Mitchell*, 400 U.S. 112, 284 (1970) (Stewart, J., concurring and dissenting).

Respect for a co-equal branch of government demands substantial judicial deference to the factual findings and predictive judgments of Congress. *Turner Broadcasting Sys. v. FCC*, 520 U.S.—, 137 L. Ed. 2d 369, 391-92 (1997). “[C]omplete factual support in the record for the . . . judgment or prediction is not possible or required . . . .” *Id.* (quoting *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 814 (1978)). Congress would suffer an impossible burden if, as Petitioners implicitly suggest, it were required to gather evidence about each type of state agency before it could act comprehensively. *Turner Broadcasting Sys.*, 137 L. Ed. 2d at 402.

Thus, when deciding to enact a national ban on literacy tests it was sufficient for Congress to find that racial prejudice is prevalent throughout the country and that such tests were discriminatory. Congress was not required to determine whether such tests had a discriminatory purpose or effect in every state and in each jurisdiction. *Oregon v. Mitchell*, 400 U.S. at 284 (Stewart, J., concurring and dissenting); *see also id.* at 216 (Harlan, J., concurring and dissenting) (Congress can decide whether to make a “more particularized inquiry”); *Katzenbach v. Morgan*, 384 U.S. at 653. If Congress has the authority to enact a nationwide remedy against discrimination without evidence of constitutional violations in every state then *a fortiori* it must have the same authority to enact national laws without gathering evidence about each state agency. Cf. *City of Rome*, 446 U.S. at 193 (Stevens, J., concurring) (“Congress has the constitutional power to regulate voting practices in Rome, so long as it has the power to regulate such practices in the entire State of Georgia”).

An extensive record of pervasive discrimination was not available to Congress when it enacted RFRA. The Court held that RFRA could not be justified as a remedy for unconstitutional conduct because the remedy was so far out of proportion to the perceived harm. *City of Boerne*, 138 L.

Ed. 2d at 646. The Court reached this conclusion after noting that the legislative record revealed no incidents of laws passed because of religious bigotry in the last forty years. *Id.* at 645 (“deliberate persecution is not the usual problem in this country”).

Unlike RFRA and like the voting rights statutes, when enacting the ADA Congress found, as Petitioners properly concede, that in our society discrimination against the disabled is “pervasive.” Pet. Brf. 13; 42 U.S.C. §12101(a)(2). Something is pervasive when it has “become diffused throughout every part.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1688 (1966). Prisons are a significant, and growing, part of our society. *See* Pet. Brf. 9 n.1. There is no reason, and Petitioners have not advanced one, to believe that prisoners are immune from discrimination that has infected every other part of society. *See* Briefs of Amici Curiae ACLU, et al. and ADAPT, et al. (collecting cases of discrimination against prisoners with disabilities). “Prejudice, once let loose, is not easily cabined.” *City of Cleburne*, 473 U.S. at 464 (Marshall, J., concurring and dissenting).

The ADA, therefore, is a constitutionally acceptable remedy for a well-documented and prevalent form of discrimination.

c. The ADA Does Not Impose A Constitutionally Excessive Burden On Prison Officials.

As noted in Part I, *supra*, the ADA is a comprehensive remedial statute of general application. It applies, by its terms, to all types of state and local government entities, such as schools, hospitals, universities, departments of motor vehicles and prisons. It is true that prisons can be dangerous places with security concerns that require particular expertise to manage. But, prisoners, unlike most other individuals with a disability, are completely dependent upon prison officials for access to all services,

including those that meet their basic needs. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (medical care).

The regulations implementing the ADA make the statute's general non-discrimination mandate specific in a way that is sensitive to the peculiar needs of individuals with disabilities and the policy decisions of local and state governments. *See supra*, Parts I and II(C)(4). Unlike RFRA, which would have permitted certain individuals to ignore local laws, the ADA regulations are a balanced response to competing interests that flow in large part from the Court's prior decisions interpreting Section 504. These regulations do not, like RFRA, provide all citizens, including prisoners, with a right that *necessarily conflicts* with state and local laws of general application and allow an individual to "ignore" even criminal laws. *See Employment Division v. Smith*, 494 U.S. at 889.

As a matter of law these remedies do not become disproportionate in state prison.<sup>41</sup> Prison officials retain considerable discretion to safely care for, treat, discipline and rehabilitate prisoners. As Justice Posner explained in a decision upholding the ADA against a similar constitutional challenge:

Terms like "reasonable" and "undue" are relative to circumstances, and the circumstances of a prison are different from those of a school, an office, or a factory, as the Supreme Court has emphasized in the parallel setting of prisoners' constitutional rights. *E.g., Turner v. Safley, supra*, 482 U.S. at 84-

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<sup>41</sup>The Voting Rights Acts approved by the Court were much more intrusive; no state interest was sufficient to overcome the statute, and the restrictions were directly aimed at the heart of the States' sovereign powers. States were not permitted to change their voting policies and practices without permission from the Attorney General or a federal court. *City of Rome*, 446 U.S. at 163-64. Certain methods of determining voting qualifications in all of the states were completely banned. *Oregon v. Mitchell*, 400 U.S. at 118 (Black, J.); *Katzenbach v. Morgan*, 384 U.S. at 644-47. Federal examiners even had the authority to decide who was eligible to vote. *South Carolina v. Katzenbach*, 383 U.S. at 316.

91. The security concerns that the defendant rightly emphasizes in urging us to exclude prisoners from the protections of the Act are highly relevant to determining the feasibility of the accommodations that disabled prisoners need in order to have access to desired programs and services. (*Crawford v. Indiana Dep't of Corrections*, 115 F.3d at 487)

Petitioners have no basis for claiming that the ADA will result in a disproportionate response at this stage of the proceedings, since the case is on appeal from a motion to dismiss. It is significant that Petitioners did not hint at the slightest security basis for denying Yeskey the right to participate in the Boot Camp. Pet. Brf. 31; *see also Yeskey*, 118 F.3d at 169, 174; JA 133-34 (doubting that security concerns will be germane on remand). In fact, Yeskey's participation in the program would have been congruent with an important penological objective—rehabilitation. *See* PA. STAT. ANN. tit. 61, §1125(b)(1) (West Supp. 1997) ("The objectives of the program are: (1) To . . . reduce recidivism and promote characteristics of good citizenship among eligible inmates").

Petitioners argue that Yeskey has no right under Pennsylvania law and the Constitution to compel his participation in the Boot Camp, and that the ADA would grant him that right unless the state can prove it would cause a fundamental alteration of the program. Pet. Brf. 31. They are wrong. Title II of the ADA is a remedy for unlawful government discrimination—nothing more. If Yeskey is "otherwise qualified" for the program, then the defendants are forbidden from excluding him *by reason of his disability*. Yeskey has "no right to more services than the able-bodied inmates, but [he has] a right, if the Act is given

its natural meaning, not to be treated even worse than those more fortunate inmates." *Crawford*, 115 F.3d at 486.

### C. Congress May Regulate Discrimination In Prison Under The Commerce Clause.

Petitioners do not dispute Congress's finding that discrimination against individuals with disabilities has a substantial effect on interstate commerce, and they concede that "some aspects of state prison administration do affect interstate commerce and can be regulated by Congress."<sup>42</sup> Pet. Brf. 23 n.7. The undisputed congressional findings and Petitioners' concession defeats their argument that the ADA is an invalid exercise of the commerce power with respect to prisons.

This is not a case where Congress regulated purely local conduct—simple possession by any person of a gun near a school—that had nothing to do with commerce. See *United States v. Lopez*, 514 U.S.—, 131 L. Ed. 2d 626, 632 (1995). Here the Boot Camp is specifically designed to reintegrate prisoners into the stream of commerce. Because of Yeskey's disability, Petitioners deprived him of the opportunity to work on public projects, to obtain treatment and to be trained so that he could find work upon release. Cf. PA. STAT. ANN. tit. 61, §1123 (West Supp. 1997). The nexus between the state's discrimination and commerce is clear.

Nor did Congress fail to make findings or collect data on the effect of disability discrimination on interstate commerce. Cf. *Lopez*, 131 L. Ed. 2d at 639-40. Because Congress rationally found that disability discrimination has a direct and immediate effect on interstate commerce,<sup>43</sup> it

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<sup>42</sup>There are good reasons for this position. In Pennsylvania alone, spending on state prisons exceeded \$1 billion ten years ago (Pet. Brf. at 9 n.1) and in 1996 the state's prison industries sold goods worth \$33 million. CORRECTIONAL INDUSTRIES ASSOCIATION, 1997 DIRECTORY: PRODUCING PRODUCTIVE PEOPLE 79 (1997).

<sup>43</sup>Congress found that "the continuing existence of unfair and (continued...)

had the authority to ban such discrimination in prisons, which are a multi-billion dollar industry, as an "essential part of a larger regulation of economic activity . . ." *Id.* at 638-39.

Petitioners' primary argument is that Congress does not have the authority to regulate discrimination in state prisons. See *Printz v. United States*, —U.S.—, 138 L. Ed. 2d 914, 942-45 (1997); *New York v. United States*, 505 U.S. 144, 161, 168-69, 188 (1991). Of course, the Court need not decide this issue because the ADA is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, which was specifically designed to intrude on the sovereign powers of the States. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

If the Court does reach this issue, Petitioners' argument fails. Both *Printz* and *New York* stand for the narrow proposition that federal legislation cannot compel the States to "enact or enforce a federal regulatory program." *Printz*, 138 L. Ed. 2d at 944; *New York*, 505 U.S. at 161. The ADA does not "press [state officials] into federal service." *Printz*, 138 L. Ed. 2d at 966 (Stevens, J., dissenting); *see id.* at 940. Nor is it, like the statute in *New York*, a "formal command from the National Government directing the State to enact a certain policy." *United States v. Lopez*, 131 L. Ed. 2d at 653 (Kennedy, J., concurring).

In short, the ADA constitutionally prohibits the States from discriminating and requires them to take certain actions to prevent future discrimination. It does not cross the constitutional line by, for example, requiring the States to operate a motivational boot camp for federal prisoners. Thus, the ADA is well within Congress's authority under

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<sup>43</sup>(...continued)

unnecessary discrimination and prejudice . . . costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity," thus necessitating "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. §12101(a)(9), (b) (emphasis added).

the Commerce and Supremacy Clauses to pass laws of general application that displace or pre-empt state laws and policies. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289-90 (1981).

### CONCLUSION

For the reasons noted above, the Court should affirm the judgment of the Third Circuit.

Respectfully submitted,

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DATED: March 30, 1998.

### APPENDIX

**AMERICANS WITH DISABILITIES ACT OF 1990**

**42 U.S.C. §§12111, 12201, 12202, 12208, 12210**

**Subchapter I - Employment**

**42 U.S.C. §12111. Definitions**

As used in this subchapter:

**(5) Employer**

**(A) In general**

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

**(B) Exceptions**

The term "employer" does not include—

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of Title 26.

#### **Subchapter IV - Miscellaneous Provisions**

##### **42 U.S.C. §12201. Construction**

###### **(a) In general**

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

##### **42 U.S.C. §12202. State immunity**

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

##### **42 U.S.C. §12208. Transvestites**

For the purposes of this chapter, the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite.

##### **42 U.S.C. §12210. Illegal use of drugs**

###### **(a) In general**

For purposes of this chapter, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

###### **(b) Rules of construction**

Nothing in subsection (a) of this section shall be construed to exclude as an individual with a disability an individual who—

- (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
- (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or
- (3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs; however, nothing in this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

###### **(c) Health and other services**

Notwithstanding subsection (a) of this section and section 12211(b)(3) of this title, an individual shall not be denied health services, or services provided in connection with drug rehabilitation, on the basis of the current illegal use of drugs if the individual is otherwise entitled to such services.

###### **(d) "Illegal use of drugs" defined**

###### **(1) In general**

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C.A. §801 et seq.]. Such term does not include the

use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act [21 U.S.C.A. §801 et seq.] or other provisions of Federal law.

**(2) Drugs**

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C.A. §812].

**CODE OF FEDERAL REGULATIONS**

**28 C.F.R. Ch. 1 (7-1-97 Edition)**

**PART 35—NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES**

**Subpart A—General**

**28 C.F.R. §35.104**

*Qualified individual with a disability* means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

**Subpart D—Program Accessibility**

**28 C.F.R. §35.149 Discrimination prohibited.**

Except as otherwise provided in §35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity or be subjected to discrimination by any public entity.

**28 C.F.R. §35.151 New construction and alterations.**

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.

(b) *Alteration.* Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a

manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.

(c) *Accessibility standards.* Design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) (appendix A to 41 CFR part 101-19.6) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) (appendix A to 28 CFR part 36) shall be deemed to comply with the requirements of this section with respect to those facilities except that the elevator exception contained in section 4.1.3(5) and section 4.1.6(1)(k) of ADAAG shall not apply. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

(d) *Alterations: Historic properties.*

(1) Alterations to historic properties shall comply, to the maximum extent feasible, with section 4.1.7 of UFAS or section 4.1.7 of ADAAG.

(2) If it is not feasible to provide physical access to an historic property in a manner that will not threaten or destroy the historic significance of the building or facility, alternative methods of access shall be provided pursuant to the requirements of §35.150.

(e) *Curb ramps.*

(1) Newly constructed or altered streets, roads, and highways must contain curb ramps or other sloped areas at any intersection having curbs or other barriers to entry from a street level pedestrian walkway.

(2) Newly constructed or altered street level pedestrian walkways must contain curb ramps or other

sloped areas at intersections to streets, roads or highways.

**28 C.F.R. §35.164 Duties.**

This subpart does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this subpart would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.

**Subpart G—Designated Agencies**

**28 C.F.R. §35.190 Designated agencies.**

(b)(6) *Department of Justice:* All programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions; commerce and industry, including general economic development, banking and finance, consumer protection, insurance, and small business; planning, development, and regulation (unless assigned to other designated agencies); state and local

government support services (e.g., audit, personnel, comptroller, administrative services); all other government functions not assigned to other designated agencies.

**Appendix A to Part 35—Preamble To Regulation  
On Nondiscrimination On The Basis Of Disability  
In State And Local Government Services  
(Published July 26, 1991)**

Excerpt from 28 C.F.R. Pt. 35, App. A, pp.472-73

“Qualified Individual with a disability.” The definition of “qualified individual with a disability” is taken from section 201(2) of the Act, which is derived from the definition of “qualified handicapped person” in the Department of Health and Human Services’ regulation implementing section 504 (45 CFR §84.3(k)). It combines the definition at 45 CFR 84.3(k)(1) for employment (“a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question”) with the definition for other services at 45 CFR 84.3(k)(4) (“a handicapped person who meets the essential eligibility requirements for the receipt of such services”).

Some commenters requested clarification of the term “essential eligibility requirements.” Because of the variety of situations in which an individual’s qualifications will be at issue, it is not possible to include more specific criteria in the definition. The “essential eligibility requirements” for participation in some activities covered under this part may be minimal. For example, most public entities provide information about their operations as a public service to anyone who requests it. In such situations, the only “eligibility requirement” for receipt of such information would be the request for it. Where such information is provided by telephone, even the ability to use a voice telephone is not an “essential eligibility requirement,” because §35.161 requires a public entity to provide equally effective telecommunication systems for individuals with impaired hearing or speech.

For other activities, identification of the “essential eligibility requirements” may be more complex. Where questions of safety are involved, the principles established in §36.208 of the Department’s regulation implementing title III of the ADA, to be codified at 28 CFR, part 36, will be applicable. That section implements section 302(b)(3) of the Act, which provides that a public accommodation is not required to permit an individual to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of the public accommodation, if that individual poses a direct threat to the health or safety of others.

A “direct threat” is a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services. In *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), the Supreme Court recognized that there is a need to balance the interests of people with disabilities against legitimate concerns for public safety. Although persons with disabilities are generally entitled to the protection of this part, a person who poses a significant risk to others will not be “qualified,” if reasonable modifications to the public entity’s policies, practices, or procedures will not eliminate that risk.

The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability. It must be based on an individualized assessment, based on reasonable judgment that relies on current medical evidence or on the best available objective evidence, to determine: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk. This is the test established by the Supreme Court in *Arline*. Such an inquiry is essential if the law is to achieve its goal of protecting disabled individuals from discrimination based on prejudice, stereotypes or unfounded fear, while giving

appropriate weight to legitimate concerns, such as the need to avoid exposing others to significant health and safety risks. Making this assessment will not usually require the services of a physician. Sources for medical knowledge include guidance from public health authorities, such as the U.S. Public Health Service, the Centers for Disease Control, and the National Institutes of Health, including the National Institute of Mental Health.

**Excerpt from 28 C.F.R. Pt. 35, App. A, p.477**

Paragraph (b)(6) prohibits the public entity from discriminating against qualified individuals with disabilities on the basis of disability in the granting of licenses or certification. A person is a "qualified individual with a disability" with respect to licensing or certification if he or she can meet the essential eligibility requirements for receiving the license or certification (see §35.104).

A number of commenters were troubled by the phrase "essential eligibility requirements" as applied to State licensing requirements, especially those for health care professions. Because of the variety of types of programs to which the definition of "qualified individual with a disability" applies, it is not possible to use more specific language in the definition. The phrase "essential eligibility requirements," however, is taken from the definitions in the regulations implementing section 504, so caselaw under section 504 will be applicable to its interpretation. In *Southeastern Community College v. Davis*, 442 U.S. 397, for example, the Supreme Court held that section 504 does not require an institution to "lower or effect substantial modifications of standards to accommodate a handicapped person," 442 U.S. at 413, and that the school had established that the plaintiff was not "qualified" because she was not able to "serve the nursing profession in all customary ways," *id.* Whether a particular requirement is "essential" will, of course, depend on the facts of the particular case.

**Excerpt from 28 C.F.R. Pt. 35, App. A, p.478**

Paragraph (b)(8) also prohibits policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others. For example, public entities may not require that a qualified individual with a disability be accompanied by an attendant. A public entity is not, however, required to provide attendant care, or assistance in toileting, eating, or dressing to individuals with disabilities, except in special circumstances, such as where the individual is an inmate of a custodial or correctional institution.

**Excerpt from 28 C.F.R. Pt. 35, App. A, p.484**

In choosing among methods, the public entity shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of individuals with disabilities. Structural changes in existing facilities are required only when there is no other feasible way to make the public entity's program accessible. (It should be noted that "structural changes" include all physical changes to a facility; the term does not refer only to changes to structural features, such as removal of or alteration to a load-bearing structural member.) The requirements of §35.151 for alterations apply to structural changes undertaken to comply with this section. The public entity may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits as appropriate.

**PART 39—ENFORCEMENT OF NONDISCRIMINATION  
ON THE BASIS OF HANDICAP IN PROGRAMS OR  
ACTIVITIES CONDUCTED BY THE DEPARTMENT  
OF JUSTICE**

**28 C.F.R. §39.150 Program accessibility: Existing facilities.**

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its

entirety, is readily accessible to and usable by handicapped persons. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by handicapped persons;

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with §39.150(a) would result in such alterations or burdens. The decision that compliance would result in such alteration or burdens must be made by the Attorney General or his or her designee after considering all agency resources available for use in the funding and alteration of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) *Methods.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The agency is not required to make structural changes in existing facilities where other methods are effective in

achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified handicapped persons in the most integrated setting appropriate.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section by December 10, 1984, except that where structural changes in facilities are undertaken, such changes shall be made by October 11, 1987, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by April 11, 1985, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the development of the transition by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

**28 C.F.R. §39.170 Compliance procedures.**

(a) *Applicability.* Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) *Employment complaints.* The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) *Responsible Official.* The Responsible Official shall coordinate implementation of this section.

(d) *Filing a complaint.*

(1) *Who may file.*

(i) Any person who believes that he or she has been subjected to discrimination prohibited by this part may by him or herself or by his or her authorized representative file a complaint with the Official. Any person who believes that any specific class of persons has been subjected to discrimination prohibited by this part and who is a member of that class or the authorized representative of a member of that class may file a complaint with the Official.

(ii) Before filing a complaint under this section, an inmate of a Federal penal institution must exhaust the Bureau of Prisons Administrative Remedy Procedure as set forth in 28 CFR part 542.

(2) *Confidentiality.* The Official shall hold in confidence the identity of any person submitting a complaint, unless the person submits written

authorization otherwise, and except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or proceeding under this part.

(3) *When to file.* Complaints shall be filed within 180 days of the alleged act of discrimination, except that complaints by inmates of Federal penal institutions shall be filed within 180 days of the final administrative decision of the Bureau of Prisons under 28 CFR part 542. The Official may extend this time limit for good cause shown. For purposes of determining when a complaint is timely filed under this subparagraph, a complaint mailed to the agency shall be deemed filed on the date it is postmarked. Any other complaint shall be deemed filed on the date it is received by the agency.

**Excerpt from 28 C.F.R. Pt. 39, Editorial Note, p.685**

Section 504 requires that regulations that apply to the programs and activities of Federal executive agencies shall be submitted to the appropriate authorizing committees of Congress and that such regulations may take effect no earlier than the thirtieth day after they have been so submitted. The Department has today submitted this regulation to the Senate Committee on Labor and Human Resources and its Subcommittee on the Handicapped and the House Committee on Education and Labor and its Subcommittee on Select Education pursuant to the terms of section 504. The regulation will become effective on October 11, 1984.

This rule applies to all programs and activities conducted by the Department of Justice. Thus, this rule regulates the activities of over 30 separate subunits in the Department, including, for example, the Federal Bureau of Investigation, the Drug Enforcement Administration, the Immigration and Naturalization Service, the Bureau of Prisons, Federal Prison Industries, and the United States Attorneys.

**Excerpt from 28 C.F.R. Pt. 39, Editorial Note, p.686**

*Section 39.102 Application*

The regulation applies to all programs or activities conducted by the Department of Justice. Under this section, a federally conducted program or activity is, in simple terms, anything a Federal agency does. Aside from employment, there are two major categories of federally conducted programs or activities covered by this regulation: those involving general public contact as part of ongoing agency operations and those directly administered by the Department for program beneficiaries and participants. Activities in the first part include communication with the public (telephone contacts, office walk-ins, or interviews) and the public's use of the Department's facilities (cafeteria, library). Activities in the second category include programs that provide Federal services or benefits (immigration activities, operation of the Federal prison system). No comments were received on this section.

**PART 41—IMPLEMENTATION OF EXECUTIVE ORDER 12250, NON-DISCRIMINATION ON THE BASIS OF HANDICAP IN FEDERALLY ASSISTED PROGRAMS**

**Subpart A—Federal Agency Responsibilities**

**28 C.F.R. §41.4 Issuance of agency regulations**

(a) Each agency shall issue, after notice and opportunity for comment, a regulation to implement section 504 with respect to the programs and activities to which it provides assistance. The regulation shall be consistent with this part.

(b) Each agency shall issue a notice of proposed rulemaking no later than 90 days after the effective date of this part. Each agency shall issue a final regulation no later than 135 days after the end of the period for comment on its proposed regulation: *Provided*, That the agency shall submit its proposed final regulation to the Assistant

Attorney General, Civil Rights Division, Department of Justice, for review at least 45 days before it is to be issued.

(c) Each such agency regulation shall:

(1) Define appropriate terms, consistent with the definitions set forth in §41.3 and with the standards for determining who are handicapped persons set forth in subpart B of this part; and

(2) Prohibit discriminatory practices against qualified handicapped persons in employment and in the provision of aid, benefits, or services, consistent with the guidelines set forth in subpart C of this part.

The regulation shall include, where appropriate, specific provisions adapted to the particular programs and activities receiving financial assistance from the agency.

**PART 42—NONDISCRIMINATION; EQUAL EMPLOYMENT OPPORTUNITY; POLICIES AND PROCEDURES**

**Subpart G—Nondiscrimination Based On Handicap In Federally Assisted Programs—Implementation Of Section 504 Of The Rehabilitation Act Of 1973**

**28 C.F.R. §42.522 New construction**

(a) *Design and construction.* Each new facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such a manner that the facility is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this subpart. Any alterations to existing facilities shall, to the maximum extent feasible, be made in an accessible manner. Any alterations to existing facilities shall, to the maximum extent feasible, be made in an accessible manner.

(b) *Conformance with Uniform Federal Accessibility Standards.*

(1) Effective as of March 7, 1988, design, construction, or alteration of buildings in conformance with sections 3-8 of the Uniform Federal Accessibility Standards (UFAS) (appendix A to 41 CFR subpart 101-19.6) shall be deemed to comply with the requirements of this section with respect to those buildings. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided.

(2) For purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with physical handicaps.

(3) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member.

**28 C.F.R. §42.540 Definitions**

(h) The term *program* means the operations of the agency or organizational unit of government receiving or substantially benefiting from the Federal assistance awarded, *e.g.*, a police department or department of corrections.

(j) *Benefit* includes provision of services, financial aid or disposition (*i.e.*, treatment, handling, decision, sentencing, confinement, or other prescription of conduct).

**36 C.F.R. Pt. 1191**

**ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD**

**Americans With Disabilities Act (ADA) Accessibility Guidelines For Buildings And Facilities; State And Local Government Facilities**

**12. Detention And Correctional Facilities.**

**12.1\* General.** This section applies to jails, holding cells in police stations, prisons, juvenile detention centers, reformatories, and other institutional occupancies where occupants are under some degree of restraint or restriction for security reasons. Except as specified in this section, detention and correctional facilities shall comply with the applicable requirements of section 4. All common use areas serving accessible cells or rooms and all public use areas are required to be designed and constructed to comply with section 4.

**EXCEPTIONS:** Requirements for areas of rescue assistance in 4.1.3(9), 4.3.10, and 4.3.11 do not apply. Compliance with requirements for elevators in 4.1.3(5) and stairs 4.1.3(4) is not required in multi-story housing facilities where accessible cells or rooms, all common use areas serving them, and all public use areas are on an accessible route. Compliance with 4.1.3(16) is not required in areas other than public use areas.

**12.2 Entrances and Security Systems.**

**12.2.1\* Entrances.** Entrances used by the public, including those that are secured, shall be accessible as required by 4.1.3(8).

**EXCEPTION:** Compliance with 4.13.9, 4.13.10, 4.13.11 and 4.13.12 is not required at entrances, doors, or doorways that are operated only by security personnel or where security requirements prohibit full compliance with these provisions.

**12.2.2 Security Systems.** Where security systems are provided at public or other entrances required to be accessible by 12.2.1 or 12.2.2, an accessible route complying with 4.3 shall be provided through fixed security barriers. Where security barriers incorporate equipment such as metal detectors, fluoroscopes, or other similar devices which cannot be made accessible, an accessible route shall be provided adjacent to such security screening devices to facilitate an equivalent circulation path.

**12.3\* Visiting Areas.** In non-contact visiting areas where inmates or detainees are separated from visitors, the following elements, where provided, shall be accessible and located on an accessible route complying with 4.3:

(1) Cubicles and Counters. Five percent, but not less than one, of fixed cubicles shall comply with 4.32 on both the visitor and detainee or inmate sides. Where counters are provided, a portion at least 36 in (915 mm) in length shall comply with 4.32 on both the visitor and detainee or inmate sides.

EXCEPTION: At non-contact visiting areas not serving accessible cells or rooms, the requirements of 12.3(1) do not apply to the inmate or detainee side of cubicles or counters.

(2) Partitions. Solid partitions or security glazing separating visitors from inmates or detainees shall comply with 7.2(3).

#### **12.4 Holding and Housing Cells or Rooms: Minimum Number.**

**12.4.1\* Holding Cells and General Housing Cells or Rooms.** At least two percent, but not less than one, of the total number of housing or holding cells or rooms provided in a facility shall comply with 12.5.

**12.4.2\* Special Holding and Housing Cells or Rooms.** In addition to the requirements of 12.4.1, where special holding or housing cells or rooms are provided, at least one serving each purpose shall comply with 12.5. An accessible

special holding or housing cell or room may serve more than one purpose. Cells or rooms subject to this requirement include, but are not limited to, those used for purposes of orientation, protective custody, administrative or disciplinary detention or segregation, detoxification, and medical isolation.

**EXCEPTION:** Cells or rooms specially designed without protrusions and to be used solely for purposes of suicide prevention are exempt from the requirement for grab bars at water closets in 4.16.4.

**12.4.3\* Accessible Cells or Rooms for Persons with Hearing Impairments.** In addition to the requirements of 12.4.1, two percent, but not less than one, of general housing or holding cells or rooms equipped with audible emergency warning systems or permanently installed telephones within the cell or room shall comply with the applicable requirements of 12.6.

**12.4.4 Medical Care Facilities.** Medical care facilities providing physical or medical treatment or care shall comply with the applicable requirements of section 6.1, 6.3 and 6.4, if persons may need assistance in emergencies and the period of stay may exceed 24 hours. Patient bedrooms or cells required to be accessible under 6.1 and 6.3 shall be provided in addition to any medical isolation cells required to be accessible under 12.4.2.

#### **12.4.5 Alterations to Cells or Rooms. (Reserved.)**

#### **12.5 Requirements for Accessible Cells or Rooms.**

**12.5.1 General.** Cells or rooms required to be accessible by 12.4 shall comply with 12.5.

**12.5.2\* Minimum Requirements.** Accessible cells or rooms shall be on an accessible route complying with 4.3. Where provided to serve accessible housing or holding cells or rooms, the following elements or spaces shall be accessible and connected by an accessible route.

(1) **Doors and Doorways.** All doors and doorways on an accessible route shall comply with 4.13.

**EXCEPTION:** Compliance with 4.13.9, 4.13.10, 4.13.11 and 4.13.12 is not required at entrances, doors, or doorways that are operated only by security personnel or where security requirements prohibit full compliance with these provisions.

(2)\* **Toilet and Bathing Facilities.** At least one toilet facility shall comply with 4.22 and one bathing facility shall comply with 4.23. Privacy screens shall not intrude on the clear floor space required for fixtures and the accessible route.

(3)\* **Beds.** Beds shall have maneuvering space at least 36 in (915 mm) wide along one side. Where more than one bed is provided in a room or cell, the maneuvering space provided at adjacent beds may overlap.

(4) **Drinking Fountains and Water Coolers.** At least one drinking fountain shall comply with 4.15.

(5) **Fixed or Built-in Seating or Tables.** Fixed or built-in seating, tables and counters shall comply with 4.32.

(6) **Fixed Benches.** At least one fixed bench shall be mounted at 17 in to 19 in (430 mm to 485 mm) above the finish floor and provide back support (e.g., attachment to wall). The structural strength of the bench attachments shall comply with 4.26.3.

(7) **Storage.** Fixed or built-in storage facilities, such as cabinets, shelves, closets, and drawers, shall contain storage space complying with 4.25.

(8) **Controls.** All controls intended for operation by inmates shall comply with 4.27.

(9) **Accommodations for persons with hearing impairments required by 12.4.3 and complying with 12.6 shall be provided in accessible cells or rooms.**

**12.6 Visible Alarms and Telephones.** Where audible emergency warning systems are provided to serve the occupants of holding or housing cells or rooms, visual alarms complying with 4.28.4 shall be provided. Where permanently installed telephones are provided within holding or housing cells or rooms, they shall have volume controls complying with 4.31.5.

**EXCEPTION:** Visual alarms are not required where inmates or detainees are not allowed independent means of egress.

Published in *Federal Register*, Vol. 63, No. 8 (January 13, 1998)

**41 C.F.R. Ch. 101 (7-1-97 Edition)**

**Appendix A to Subpart 101-19.6—Uniform Federal Accessibility Standards.**

**I. Purpose.**

This document sets standards for facility accessibility by physically handicapped persons for Federal and federally-funded facilities. These standards are to be applied during the design, construction, and alteration of buildings and facilities to the extent required by the Architectural Barriers Act of 1968, as amended.

The technical provisions of these standards are the same as those of the American National Standard Institute's document A171.1-1980, except as noted in this test and on figures by italics.

**4.1.4**

\* \* \*

(9) **Institutional.** Institutional occupancy include among others, the use of a building or structure, or portion thereof, in which people have physical or medical treatment or care, or in which the liberty of the occupants is restricted. Institutional occupancies shall include the following subgroups:

\* \* \* \*

(c) Institutional occupancies where the occupants are under some degree of restraint or restriction for security reasons including:

Facilities	Application
Jails	5 percent of residential units available, or at least one unit, whichever is greater; all common use, visitor use, or areas which may result in employment of physically handicapped persons.
Prisons	
Reformatories	
Other detention or correctional facilities	

Excerpts from *Federal Register*, Vol. 45, No. 108  
(June 3, 1980)

28 C.F.R. Pt. 42

**Nondiscrimination Based on Handicap in Federally Assisted Programs—Implementation of Section 504 of the Rehabilitation Act of 1973 and Executive Order 11914**

Excerpt from p.37,621

The use of qualified interpreters in various settings (e.g., police interrogations, court proceedings, correctional rehabilitation programs) who are, when possible, certified by a recognized certification agency, is another important method of ameliorating the communications barriers experienced by speaking and hearing impaired individuals. A recipient's need for an interpreter is usually not on a continuing basis, and the overall compliance cost would not be substantial.

Excerpt from p.37,627

**Appendix B—Analysis of Final Rule.**

*A. General Provisions.*

This subpart prohibits discrimination on the basis of handicap in any program, activity or facility receiving Federal financial assistance (§42.501). Section 504 protects not only the ultimate beneficiaries of Federal assistance statutes (e.g. students, prisoners, general public) as identified in the Federal grant statutes) directly or by inference, but also nonbeneficiary participants (e.g., employees working in the program receiving Federal financial assistance regardless of whether a primary objective of the Federal assistance includes providing employment opportunities). The subpart applies to all Federal assistance programs administered by the Department and requires all recipients of such assistance to comply with the requirements of the subpart (§42.502). The subpart not only applies to grants, contracts and cooperative agreements entered into after the effective date of the subpart, but also applies to any Federal financial assistance previously extended which continues at the time the subpart becomes effective.

Excerpt from p.37,630

*2. Detention and Correctional Agencies and Facilities.* These agencies include jails, prisons, reformatories and training schools, work camps, reception and diagnostic centers, pre-release and work release facilities, and community-based facilities. Where local or State policy prohibits the detention or incarceration of wheelchair users, no structural modification to detention or correctional facilities to accommodate wheelchair users is required. Where there is no such exclusionary policy, structural modifications may be unnecessary where alternate accessible facilities are available (e.g., short term detention in the prisoner's home or at a medical facility). Where local policy precludes alternate detention facilities, a detention

agency would be required to make structural modifications to accommodate detainees or prisoners in wheelchairs. In such circumstances, however, not every detention facility of the agency would have to become accessible. Only a sufficient number of detention cells need to be accessible to wheelchair users as can be reasonably expected to be detained based on the agency's prior experience. A different problem arises, however, when accessibility requirements are imposed on small, independently operated community based facilities used, for example, for the placement of juveniles in a home setting. A metropolitan area may have a number of such homes. Each such home receiving assistance from the Department with fewer than fifteen employees is not required to be accessible to handicapped persons as long as a sufficient number of homes are accessible in the service area. If a home, after consultation with the handicapped person concerned, determines that its facilities are not accessible to such person because of the person's handicapping condition, it is the responsibility of the home to locate an accessible home providing equivalent services (§42.522(c)).

All detention and correctional agencies must provide accessibility for handicapped visitors (*e.g.*, accessible visiting rooms, restrooms) since the prisoner's right to receive visitors is an element of the program administered by the agencies. Where a facility's visitation area is inaccessible to the handicapped, a detention or correctional agency has the option to (a) house the prisoner in a facility which is accessible to handicapped visitors, (b) move the prisoner to an alternate, accessible area either within or outside the facility for visits from wheelchair users, (c) make structural modifications to make the visitation area accessible. It should be kept in mind that the benefit provided is the right to visit rather than the right to visit in any particular area.

Facilities available to all inmates or detainees, such as classrooms, infirmary, laundry, dining area, recreation areas, work areas, and chapels, must be readily accessible

to any handicapped person who is confined to that facility. Beyond insuring the physical accessibility of facilities, detention and correctional agencies must insure that their programs and activities are accessible to handicapped persons. For example, correctional agencies should provide for the availability of qualified interpreters (certified, where possible, by a recognized certification agency) to enable hearing impaired inmates to participate on an equal basis with nonhandicapped inmates in the rehabilitation programs offered by the correctional agencies (*e.g.*, educational programs).

Correctional officials should take into account any handicaps which inmates may have in classifying them. In making housing and program assignments, such officials must be mindful of the vulnerability of some handicapped inmates to physical and other abuse by other inmates. The existence of a handicap alone should not, however, be the basis for segregation of such inmates in institutions or any part thereof where other arrangements can be made to satisfy safety, security and other needs of the handicapped inmate.

**Excerpt from  
COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF CORRECTIONS  
QUEHANNA BOOTCAMP INMATE HANDBOOK**

**Excerpt from pp.47-50**

**Inmate Program Schedule (Mon - Fri)  
Quehanna Boot Camp**

05:30 Wake Up Call

05:35 Official Count

Once the official count is announced, all inmates will stand at their official count position for that building until the official count is completed.

05:50 Physical Training

All inmates will be dressed in their physical training attire, have their bunks made, and standing at the designated count position. Staff, normally the Area Commander or the Sergeant, will have the inmates fall out for formation and will march the inmates to an appropriate location and supervise a twenty to thirty minute calisthenics period. Staff will then run with the inmates for twenty to thirty minutes.

All inmates requesting sick call will be directed to wait in the visiting room until the screening begins.

06:30 All inmates will be marched to their rooms to shower, shave, and dress in the appropriate uniform of the day.

07:00 Breakfast Meal - Medication Call - Room inspection.

The call for breakfast meal will be by an assigned rotation schedule which is based on competition between the squads in inspections. After eating the breakfast meal, each inmate will return to their

room and wait there until the next organized movement. All inmates will be marched to the Food Service Department for meals.

Inmates will proceed to the medical office to receive prescribed medication after eating the morning meal.

All inmates will be standing in their designated count position once the command "Stand By For Inspection" is announced. They will be called to the position of "Attention" once the inspection begins. Inmates will be dressed in the "Uniform of the Day." Shirts will be tucked in, and footwear (boots) will be shined and properly laced. The uniform will be neat, clean and pressed. All personal items will be stored in the proper location within the lockers (see diagram). The bunks will have two sheets, one blanket, one pillow, one pillow case and one mattress.

08:00 Flag Ceremony

Staff will have the inmates fall out for formation and will march the inmates to the flag pole. The National Flag will be unfolded and hoisted to the top of the flag pole followed by the State Flag and the Department of Corrections Flag, using the same procedures as the National Flag.

08:30 Work Assignments.

08:40 Inmates will be broken down by squads and assigned work with a Labor Foreman or other duties within the Main Complex.

11:30 Morning Session of Work Programs End

Inmates working in the field will be fed in the field. Inmates working at the Main Complex will be marched to their rooms to clean up and wait for the lunch meal.

11:45 **Lunch Meal - Medication Call**  
 Inmates will be marched to the Dining Room based on the established meal rotation for the day. Before being called for the meal and after eating the meal, inmates will remain in their room and work on studies, sanitation, and other required activities. Inmates working in the field will be fed directly after the official count is completed.

12:45 **Official Count**  
 The official count will be taken immediately after the lunch meal. Once the official count is announced, all inmates will stand at their official count position for that building until the official count is completed.

13:00 **Work Crew Assignments/GED Education/Islamic Church services on Fridays only.**  
 All inmates will be marched to their work area and continue their work assignments.

14:15 **DATS Counselling Session - individual or group**  
 If an inmate is scheduled for Treatment Program he will receive a pass from the 6 - 2 Housing Unit Officer after inspection. The inmate will notify his Work Supervisor (Labor Foreman or Kitchen Staff) of the appointment when reporting for the work assignment at 08:40 hours. The Work Supervisor will sign the pass and direct the inmate to his appointment. All inmates must take the most direct route to the appointment by not entering unauthorized areas without permission.

15:25 **Afternoon session of work and treatment programs end.**

15:30 **Showers**  
 Inmates are marched to their rooms to take their daily shower and change into the evening uniform

(brown pants, white shirt, and brown tie and dress boots).

15:50 **Flag Ceremony**

16:00 **Supper Meal - Medication Call**  
 Inmates will be marched to the dining room based on the established meal rotation for the day. Inmates will remain in their rooms until called to the dining room and will return to their room after eating. Before being walked for the meal and after eating the meal, inmates will remain in their room polishing their work boots and getting ready for the evening treatment programs. Count will be taken immediately following completion of the evening meal.

17:00 **Official Count**  
 Once the official count is announced, all inmates will stand at their official count position for that building until the official count is completed.

17:15 **Community Meeting/GED Education**  
 Inmates will be marched to the conference room. The foundation of the treatment program emphasizes community living and socialization skills. Each platoon lives as a team, meeting daily in community meetings to resolve problems and reflect on their progress in the program. The core of this community is designed for inmates to practice behaviors which will help them to develop and to seek realistic goals through honest effort.

17:45 **Educational Programming and Treatment Programs**  
 A substance abuse program includes education, self-help, support groups, group and individual therapy. Inmates participate in classroom and treatment sessions several times each week throughout their six month program. Sessions are related to changing attitudes and habits of

substance abuse, based on the philosophy of abstinence and recovery.

20:30 Individual counseling w/DATS and individual study time.

All inmates will be in their rooms working on educational and treatment booklets, studies, and other assigned activities unless meeting with a DATS.

21:00 Official Count

Once the official count is announced, all inmates will stand at their official count position for that building until the official count is completed.

21:10 Individual Time

All inmates will be in their rooms working on their laundry, ironing, sanitation, letter writing, shining boots, working on studies and other required activities.

21:15 Medication Call

Inmates will proceed to the Registered Nurse's Office to receive prescribed medication after count clears.

21:30 Lights Out

The room lights are turned out. All inmates remain in their bunks unless using the toilet.